United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

76-2173

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- -X

ARTHUR DRAYTON

Petitioner-Appellee

-against-

THE PEOPLE OF THE STATE OF NEW YORK, EUGENE GOLD, District Attorney, LOUIS J. LEFKOWITZ, Attorney General State of New York, DEPARTMENT OF CORRECTIONS OF THE CITY OF NEW YORK, and BENJAMIN MALCOLM, Commissioner, and ARTHUR RUBIN, Warden of Rikers Island

Docket Number
76-2173

Respondents-Appellants

- -X

B
pls

A P P E N D I X

EUGENE GOLD
District Attorney
Kings County
210 Joralemon Street
Brooklyn, New York 11201

FRANKLIN L. CARROLL, III
Assistant District Attorney
Of Counsel

Eugene Gold
District Attorney
Kings County

UNITED STATES COURT OF APPEALS
FILED
FEB 14 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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LIST OF THE PARTS OF THE RECORD
CONTAINED IN THE APPENDIX

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Date	NR.	PROCEEDINGS
9-16-76		Petition for writ of habeas corpus filed. (See doc.#1)
9-21-76		By NEAHER, J.--Order to show cause dtd. 9-16-76 ret. 9-24-76 why a writ of H.C. should not issued filed without proof of service (1)
9-24-76		Before NEAHER, J. Case called: OTSC heard. Decision reserved. (2
9-28-76		Consent dtd 9-28-76 filed.
9-28-76		By NEAHER, J.-Order dtd. 9-28-76 that the petitioner be released from custody upon posting bail of $1,000.00 case or surety. See document #2. mg ---
12-1-76		By NEAHER, J-Memo & Order dtd 12-1-76 granting the application for a writ of habeas corpus, petitioner's release from State custody is directed, his conviction as an adult offender shall be vacated and replaced by a youthful offender finding, and the indictment and all other records pertaining to his conviction shall be sealed or otherwise retained in confidential status in accordance with youthful offender procedures filed. Copies mailed to all parties. (3)
12=2-76		*JUDGMENT dtd 12-2-76 granting the application for writ of habeas corpus and directing petitioner's immediate release from state custody etc filed. (4)
12-14-76		Notice of appeal filed. (Eugene Gold) Copy of notice mailed to C of A. (5)
12-27-76		Civil appeal scheduling order filed-1 (6)

Drayton

-2-

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

ARTHUR DRAYTON,

Petitioner,

- against -

THE PEOPLE OF THE STATE OF NEW YORK, EUGENE GOLD, DISTRICT ATTORNEY AND LOUIS J. LEFKOWITZ, ATTORNEY GENERAL STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS OF THE CITY OF NEW YORK AND BENJAMIN MALCOLM, COMMISSIONER, ARTHUR RUBIN, WARDEN OF RIKERS ISLAND,

Respondents.

----------x

ORDER TO SHOW CAUSE

Upon the verified petition, and the exhibits attached, of ARTHUR DRAYTON, the petitioner, for issuance of a Writ of Habeas Corpus, it is

ORDERED, that the respondents show cause before this Court at the Courthouse thereof, located at 225 Cadman Plaza East, Brooklyn, New York, before In Courtroom # 2 ~~Justice~~ of the said Court, at 4 P.M., on September 24, 1976, WHY a Writ of Habeas Corpus should not issue herein as prayed for in said petition, and WHY an order should not issue discharging the petitioner, and WHY the respondents should not be requested to appear and answer the allegations of this petition; and after a full and complete hearing, the Court relieve this petitioner of the unconstitutional detention and imprisonment; and WHY the Court should not grant such other and further and different relief as to the Court may seem just and proper under the circumstances;

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U.S. DISTRICT COURT E.D.N.Y.

and it is further

ORDERED, that service of this order to Show Cause together with copy of verified petition and exhibits attached on the respondents on or before September 17, 1976, at 5:00 O'clock P.M. be deemed sufficient service.

Dated: September 16, 1976

S/ NEAHR
U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

ARTHUR DRAYTON,

Petitioner,

- against -

THE PEOPLE OF THE STATE OF NEW YORK, EUGENE GOLD, DISTRICT ATTORNEY, AND LOUIS J. LEFKOWITZ, ATTORNEY GENERAL STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS OF THE CITY OF NEW YORK AND BENJAMIN MALCOLM, COMMISSIONER, ARTHUR RUBIN, WARDEN OF RIKERS ISLAND,

Respondents.
----------x

PETITION

TO THE UNITED STATES DISTRICT FOR THE EASTERN DISTRICT OF NEW YORK:

Petitioner, ARTHUR DRAYTON, alleges:

I am presently confined to prison under the jurisdiction of the Department of Corrections of the City of New York, at Rikers Island, under Confinement No. 110-76-663 and I am presently in Building C74.

The said restraint is the result of my conviction of assault in the Third Degree in the Supreme Court of the State of New York, County of Kings, Indictment No.8218/1972 which was based upon my plea of guilty to assault in the Third Degree, a misdemeanor. I was sentenced to a term of imprisonment for one year.

Subsequent to the said sentence, I moved for resentence upon the ground that I was entitled to Youthful Offender treatment as a matter of right, whereas the sentencing Court, the Supreme Court of the State of New York, Kings County had imposed upon me

an adult sentence as a matter of discretion. This discretionary sentence was in conformance with the statutory provisions of the Criminal Procedure Law of the State of New York which provisions are being attacked as unconstitutional in this proceeding.

I was indicted and charged with attempted robbery, Second Degree, and assault, Second Degree, committed on August 18th, 1972. On May 15th, 1973, I appeared at the Supreme Court, Kings County, Criminal Term, Part 18, Koota, J. presiding, and applied for permission to withdraw a previous plea of not guilty to the indictment and to plead guilty to assault in the Third Degree, a Misdemeanor. The Court inquired of the District Attorney as to whether that plea was acceptable to the People. The assistant District Attorney, appearing for the People, stated that the plea of assault in the Third Degree, a Class A Misdemeanor, was recommended by the People (3) (numerical references are to pages of the transcript of the minutes of May 15, 1973, a copy of which is hereto annexed.). The assistant District Attorney then stated "I had the complaining witnesses ***here in court and after discussion with both witnesses as to the matter that occurred on August 18, 1972-***I have determined that the attempted robbery in the Second Degree was not a proper disposition based upon the statement of the witnesses. It is an assault in the Third Degree at the most." The court noted that assault, Third Degree, was a Class A Misdemeanor, (4). The court then ascertained that the petitioner was 17 years old, (5) and observed that he was an 'eligible youth' (7) and could receive Youthful Offender treatment (8). The plea of guilty to the Misdemeanor

was accepted (12). In answer to a question by the court, petitioner stated that he had no Criminal Record (15).

On August 27, 1973, petitioner appeared for sentence before Koota, J. (2) (this numerical reference and subsequent numerical references will refer to the pages of the transcript of the sentence minutes of August 27, 1973). The court pointed out that Petitioner had had two juvenile court experiences (7), and denied Youthful Offender treatment, and sentenced petitioner to incarceration for one year (9).

Petitioner contends that he has been denied equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States. The statutory scheme by virtue of which he was denied Youthful Offender treatment and a sentence of six months maximum is clearly unconstitutional.

CPL 720.20 provided that a youthful offender could be relieved "from onus of a criminal record" (subd.1a). In the same section it is provided that "where the conviction is had in a local criminal court and the eligible youth has not prior to commencement of trial been convicted or found a youthful offender, the court must find he is a youthful offender." (subd.1b). In the same section it is further provided that "upon determination that an eligible youth is a youthful offender, the court must direct that the conviction be deemed vacated and replaced by a Youthful Offender finding, and the Court must sentence the defendant pursuant to Section 720.25." (Subd. 3). In Section 720.25, at Subd. (b)(ii),

there is a provision prohibiting a sentence of imprisonment in ex-
cess of six months.

From the provisions of the statute, it thus appears that petitioner would be entitled to Youthful Offender Treatment, as a matter of right, if:

1. The conviction were had in a local criminal court; and

2. The petitioner were an eligible youth; and

3. The petitioner had not, prior to the commencement of trial, been convicted of a crime or found a Youthful Offender.

Petitioner was found, by the Court, to be an eligible youth (transcript of May 15th, 1973, page 7). The only prior contacts of petitioner with law enforcement were in Juvenile Court (transcript of August 27th, 1973, page 7). It is well established that an adjudication of Juvenile Delinquency is not a conviction. R. v. Ploskitt 34 A.D.2d 402. Petitioner has not been found to have ever been a Youthful Offender, and there is no claim of any such finding.

The only condition, therefore, which might justify the denial of Youthful Offender treatment to petitioner is, thus, the first listed condition above, i.e., the requirement of the conviction in a "local criminal court". "Local criminal court" is defined in CPL, Sec. 10.10(3). A number of categories are there listed. Two categories are pertinent. "Local criminal court" means the New York City Criminal Court (CPL 10.10 (3(b)); and "Local Criminal Court" means "Supreme Court Justice sitting as a "Local

Criminal Court" (CPL 10.10 (3)(f). In denying Youthful Offender treatment to the petitioner, the sentencing court thus held that he was not "sitting as a local criminal court"; and since the conviction was not had in the New York City Criminal Court, according to the Statutory provisions, the "local criminal Court" condition was not met. It is the contention of the petitioner that since it appears that such a finding can be made under the CPL statutory scheme, the statutory scheme is unconstitutional because it has deprived him of the equal protection of the law.

The prosecution conceded, at Page 4 of the minutes of May 15, 1973, that the facts, attested by the complaining witnesses, revealed that petitioner should originally have been charged with a Misdemeanor rather than a Felony. Presumably, other defendants committing the very same violation, under the very same circumstances, would be charged with Misdemeanors only. Defendants, charged with Misdemenaors, would ordinarily be prosecuted in a local criminal court (Cf CPL 10.30). Such defendants, otherwise in the very same circumstances as the petitioner, would be entitled to Youthful Offender treatment as a matter of right, having met all three conditions. It is obvious that the petitioner, due to the prosecution's sheer error in procedure, has been prosecuted in other than a local criminal court where he should have been prosecuted, and has thus been deprived, without due process, of his right of Youthful Offender treatment. He has thus been denied equal protection of the law. The result would

be the same even if the prosecution had not made the error. If the prosecution had been intentionally steered into the Supreme Court as a matter of choice between the Supreme Court and the local Criminal. Court, the petitioner would still have been denied the equal protection of the law, because others, in petitioner's identical circumstances, having committed the identical crime, would have been prosecuted in a local criminal court where they would have been entitled to Youthful Offender treatment as a matter of right.

Thus, the degrees of punishment, for the identical crime, would differ as between persons in the very same circumstances and situation.

A statute which prescribes different degrees of punishment for the very same acts, committed under the very same circumstances, by persons in the very same situation, denies equal protection of the law in violation of the 14th Amendment of the United States Constitution. Equal protection of the law requires that, in the administration of criminal justice, none shall be subjected, for the identical offense, to any punishment greater or different from that to which others are subjected. U.S. vs. Meyers 143 F. Supp. 1. The 14th Amendment to the United States Constitution provides that no state may "deny to any person within its jurisdiction the equal protection of the laws." A statute imposing punishment for violation of a law, applicable to five counties, different from the punishment, for the same violation, applicable to other counties of the State, was held invalid in State vs. Fowler, 136 S.E. 709.

A statutory scheme regarding treatment of Youthful Offenders was held to be unconstitutional, as a denial of equal

protection, because it provided that 16 and 17 year old offenders arrested in a certain City, be treated as adults, while, if arrested outside the City, the same offenders would be treated as juveniles, Long vs. Robinson 316 F. Supp. 22, App. Den. 432 F. 2d 977, affd. 436 F. 2d 1116.

It is of no materiality that the prosecution may not have intentionally steered the prosecution of petitioner away from the New York City Criminal Court where he would have had the right to youthful offender treatment. The fact remains that he was not afforded that right, while others, convicted of the identical crime, under identical circumstances in every respect, acquired that right automatically in the New York City Criminal Court.

"Due process requires that all juveniles be treated alike, just as much as it requires that all adults be treated alike. To allow the State, regardless of the motives of its officers, to deprive (an accused juvenile) of the same rights accorded to other juveniles * *is deprivation of his Constitutional rights as required under the due process clause of the 14th Amendment of the Constitution. Regardless of the well-intentioned motives of all the judicial officers involved, this Court cannot help but believe that due process must, under all circumstances, encompass the requirement that all persons, rich or poor, young or old, be accorded equal treatment." Redmon v. Peyton, 298 F. Supp. 1123, 1127. mod. o.g. 420 F 2d 822.

"Generally speaking, the law with respect to the punishment to be inflicted for a crime must operate equally on

every citizen or inhabitant of the state, and a statute is void as a denial of the equal protection of the laws which prescribes different punishments or different degrees of punishment for the same acts committed under the same circumstances by persons in like situation." Vol.16A C.J.S. pages 529-530, Sec.564.

It is, of course, impossible, to evolve a statutory scheme which will insure against all differences in punishment administered. However, when statutory distinctions are made, they must be based upon reason, and must have a purpose which is apparent and logical.

"Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made. Walters v. City of St. Louis, 347 U.S. 231, 237." Baxstrom v. Herold, 383 U.S. 107, 111.

In re Buttonow, 23 N.Y. 2d 385, the New York Court of Appeals followed the decision of the Supreme Court of the U.S. in Baxstrom v. Herold, 383 U.S. 107, supra, and paraphrased the Baxstrom opinion to dispose of the issue in Buttonow. This Court might well similarly paraphrase the Baxstrom opinion by holding that the New York Legislature, having accorded to youthful offenders the right to special treatment under CPL 720.20, and a prohibition of "a definite sentence of imprisonment with a term in excess of six months" under CPL 720.25 (b) (ii), " may not consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold" such right and prohibition by limiting such right and prohibition to offenders convicted""in a local criminal court"

under CPL 720.20 (1) (b), and thereby withhold such right and prohibition from the petitioner only because he has been convicted in the Supreme Court rather then in the New York City Criminal Court.

"The constitutional provisions * * * (14th Amendment to the U.S. Constitution, and Article I, Sec. 11 of the New York Constitution) extend the protection to all persons * * * and prohibit any state legislation which in effect denies to any * * * individual the equal protection of the laws. (See Truax v. Corrigan, 257 U.S. 312, 12 S. Ct. 124, 66 L.Ed. 254, 27 A.L.R. 375). It has been held, and rightly so, that a provision not objectionable on its face may be adjudged unconstitutional because of its effect and operation. East Coast Lumber Terminal v. Town of Babylon, 2 Cir., 174 F. 2d 106, 8 A.L.R. 2d 1219, and every state official, high or low, is bound by the Fourteenth Amendment. United States v. Raines, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 526 * * * (a) classification is discriminatory * * * (if) it distinguishes between users who ride by charter motorbus as against all others. Supreme Court rulings on the issue are contained in Truax v. Corrigan (257 US 312) wherein on page 337 of 257 U.S., on page 131 of 42 S. Ct., the Court said that classification must be reasonable and this classification: ' Must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' * * * ' * * * constitutional provisions for the security of person and property should be liberally construed. A close and literal construction

deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. '* * * Arbitrary selection can never be justified by calling it a 'classification' *.* * Therefore, equal protection of the laws is denied when all persons in the same class are not treated alike under like circumstances and conditions, both in the privilege conferred and liabilities imposed. Sacharoff v. Corsi, 294 N.Y. 305, 62 N.E. 2d 81. People v. Bitniak, 59 Misc. 2d 264.

"Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatment be not so disparate, relative to the difference in classification, as to be wholly arbitrary. C.F. Dominion Hotel, Inc. v. Arizona, 249 U.S. 265; Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412; New York Rapid Transit Corp. v. City of New York, 303 U.S. 573; Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535." Walters v. City of St. Louis, 347 U.S. 231, 237.

" 'The Legislature may create statutory distinctions, but the power cannot be exercised arbitrarily and the distinctions must have some reasonable basis * * * ' Park Ave. Clinical Hosp. v. Kramer, 48 Misc. 2d 826, 829, 266 N.Y.S. 2d 147, 151, mod. 26 A.D. 2d 613, 271 N.Y.S. 2d 747, aff'd. 19 N.Y. 2d 958, 281 N.Y.S. 2d 359, 228 N.E. 2d 411." North Bellmore Teachers Ass'n. v. Board of Ed. of Union Free School Dist. No. 4, 68 Misc. 2d 238.

It is clear and obvious that the distinction, attacked at bar, has no reasonable basis whatsoever. It makes absolutely no sense that a valuable right accrues to a convicted defendant in the New York City Criminal Court, and may be denied to another identical defendant in the Supreme Court for no other reason, whatsoever, than the mere difference in Courts!

"There can be no doubt that when individual rights are involved all must stand on an equal footing before the bar of justice. Furthermore, a classification which serves as a basis for unreasonable and arbitrary discrimination between persons in meting out justice violates the fourteenth amendment." Haley v. Troy, 338 F. Supp. 794, 801.

The classification, at bar, creating a difference in treatment of identical persons, because of a mere difference in courts, is the basis of the unreasonable and arbitrary discrimination condemned in the Haley case, supra, and other cases herein cited.

The objective of the Legislature in providing for the right to youthful offender treatment was to aid in the rehabilitation of young persons for the first time convicted of a crime. The provision for different treatment in different courts cannot possibly bear any relationship to this worthy social objective. The statutory scheme is, therefore, unconstitutional.

The Supreme Court of the United States has recently held:

"The Equal Protection Clause of (the 14th) Amendment does ... deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different

classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)." Reed v. Reed, 404 U.S. 71, 75-76.

The Fourteenth Amendment to the Constitution of the United States, was proposed by Congress in 1866, shortly after the end of the Civil War. Its primary, historical purpose was to remove all doubt as to the status of the newly freed negroes, and to confer upon them rights equal to those of all citizens. In re L-ok Tin Sing, 21 F. 905. However, the rights established are personal rights and guaranteed to all, regardless of race or color. City of Birmingham v. Monk, 185 F. 2d 859, Cert. den. 341 U.S. 940.

Petitioner has every right to rely on the provisions of the Fourteenth Amendment as a guarantee that he will be afforded equal protection under the law.

"When the law lays an unequal hand on those who have committed the same quality of offense ..., it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. Yick Wo. v. Hopkins (118 U.S. 356), supra; Gaines v. Canada, 305 U.S. 337", Skinner v. Oklahoma, 316 U.S. 535, 541.

It is of no moment that, in adopting the statutory

scheme, under attack. the Legislature was acting in good faith and without conscious attempt to discriminate between persons convicted in different courts. The essential question is whether the statute has created an unreasonable discrimination. Wales v. Gallan, 61 Misc. 2d 681.

It is respectfully submitted that unreasonable discrimination exists when two persons of identical backgrounds, convicted of having committed the identical crime, under identical circumstances, may be subject to different treatment and punishment, merely because they were prosecuted in different courts.

SEE NEXT PAGE

Petitioner has been denied equal protection of the law in violation of the Constitution of the United States and the State of New York. The statutory scheme, by virtue of which he has been denied youthful offender treatment, and a sentence of six months maximum, is unconstitutional.

Petitioner moved before the Supreme Court, for resentence as a youthful offender claiming unconstitutionality of the statutory scheme by virtue of which he has been denied youthful offender treatment as a matter of right. This motion was returnable before the Criminal Term which denied petitioner's motion by order entered December 6, 1973. An application was made to the Appellate Division, Second Department, for leave to appeal from the order denying the motion for resentence. By order dated February 27, 1974, the Appellate Division granted leave to appeal. On appeal, the Appellate Division, Second Department, by order entered April 28, 1975, unanimously affirmed the judgment and order of the criminal term. Petitioner moved for reargument and reconsideration before the Appellate Division, Second Department. This motion was denied by order dated May 30, 1975. Petitioner applied for leave to appeal to the Court of Appeals. The motion for leave to appeal to the Court of Appeals of the State of New York was granted by certificate dated June 9, 1975. The Court of Appeals of the State of New York affirmed on May 4, 1976. Petitioner moved, in the Court of Appeals in the State of New York, for reargument. The motion for reargument was denied by the New York State Court of Appeals by order entered July 13, 1976. Petitioner has thus exhausted all State remedies.

Petitioner respectfully submits that for the purpose of the consideration of this Court, the State remedies should be considered exhausted without any application to the Supreme Court of the United States for certiorari (Fay v. Noia, 372 U.S. 391).

No previous application to this Court has been made for the Writ of Habeas Corpus on the grounds alleged herein.

WHEREFORE, petitioner prays that a Writ of Habeas Corpus be directed to the respondents on petitioner's behalf so that the petitioner may be brought before this Court; that respondents be requested to appear and answer the allegations of this petition; that after full and complete hearing, this Court relieve this petitioner of the unconstitutional detention and imprisonment; and that the Court grant such other and further and different relief as to the Court may seem just and proper under the circumstances.

Arthur Drayton
ARTHUR DRAYTON

STATE OF NEW YORK)
COUNTY OF KINGS) SS:

ARTHUR DRAYTON, being duly sworn, deposes and says:

Deponent is the petitioner in the within action; deponent has read the foregoing petition and knows the contents thereof; that the same is true to petitioner's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, petitioner believes it to be true.

Sworn to before me this
16th day of September, 1976.

Arthur Drayton
ARTHUR DRAYTON

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

SINGER & BLOCK

Attorneys for

Office and Post Office Address

26 Court Street

Borough of Brooklyn Brooklyn, N. Y. 11242

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir, Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc,

SINGER & BLOCK

Attorneys for

Office and Post Office Address

26 Court Street

Borough of Brooklyn Brooklyn, N. Y. 11242

To

Attorney(s) for

Index No. Year 19

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ARTHUR DRAYTON,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK, etal.,

Respondents.

Received
Legal Bureau
Dept. of Corrections
Oct. 16, 1976
Robert Daly

OR DER TO SHOW CAUSE

SINGER & BLOCK

Attorneys for Petitioner

Office and Post Office Address, Telephone

26 Court Street

Borough of Brooklyn Brooklyn, N. Y. 11242

858-4140
522-1919

To

Attorney(s) for

Service of a copy of the within is hereby admitted.

Dated,

Attorney(s) for

-3-

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'76 SEP 24 AM 9:38
DISTRICT ATTORNEY
KINGS COUNTY, N.Y.

EXHIBITS IN SUPPORT OF APPLICATION IN
THE PEOPLE OF THE STATE OF NEW YORK,
- against -
ARTHUR DRAYTON

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(PLEA)

THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS : CRIMINAL TERM PART 18

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

ARTHUR DRAYTON & KENNETH WASHINGTON,

Defendants.

Ind. No. 8218/1972

Brooklyn, N.Y.
May 15, 1973

BEFORE:

HON. AARON KOOTA, Justice.

APPEARANCES:

BLOSSOM HELLER, ESQ.
Assistant District Attorney
For the People

NATHAN SCHWARTZ, ESQ.
Attorney for Washington

SEYMOUR TABACOFF, ESQ.
Attorney for Drayton

AUGUSTINE PERILLO, CSR
OFFICIAL COURT REPORTER

THE COURT: Now, are you Arthur Drayton?

DEFENDANT DRAYTON: Yes.

THE COURT: And is Mr. Singer - -

MR. SCHWARTZ: Nathan Schwartz.

THE COURT: Yes. You're - - why did Mr. Levine appear yesterday?

MR. LEVIN: I appeared because Mr. Singer wasn't available.

THE COURT: Mr. Singer, you're a partner of Mr. Singer.

MR. SCHWARTZ: No, I am not sir.

THE COURT: Mr. Schwartz - -

MR. SCHWARTZ: He is on trial today.

THE COURT: He was in yesterday and he explained that he'd have you or someone stand in for him.

MR. SCHWARTZ: Yes.

THE COURT: You're Mr. Schwartz?

MR. SCHWARTZ: Yes.

THE COURT: And Kenneth Washington, Mr. Tabacoff is your attorney?

DEFENDANT:WASHINTON:Yes.

THE COURT: May I have the Indictment here, 8218, I have it here.

Yes.

Counsel for defendant Drayton, Mr. Schwartz do you have an application to make?

MR. SCHWARTZ: Yes, your Honor. The defendant, Arthur Drayton, respectfully requests to withdraw his plea of not guilty and plead guilty to assault in the third degree.

MISS HELLER: Plea of assault in the third degree a Class A misdemeanor is recommended by the District Attorney. The statement that I am about to make will also hold true for the co-defendant.

THE COURT: Just a minute. Before you make any statement. You say that the plea of guilty to assault in the third degree on behalf of defendant Drayton is satisfactory to you?

MISS HELLER: Yes, sir.

THE COURT: Mr. Tabacoff do you have an application?

MR. TABACOFF: At this time, the defendant Washington wishes to withdraw his plea

heretofore entered of not guilty and plead guilty to assault in the third degree.

MISS HELLER: The plea is recommended by the District Attorney.

THE COURT: Now, you say you wish to make a statement, Miss Heller?

MISS HELLER: Yes, your Honor.

Yesterday, I had the complaining witnesses Wilfred Fisher and Susan Grzeskowski here in Court, and after a discussion with both witnesses as to what occurred on August 18, 1972, in a train station at or about that day, five in the evening. I have determined that the attempted robbery in the second degree was not a proper disposition based upon the statement of the witnesses themselves. This is an assault in the third degree at the most.

THE COURT: And that is the reason it's what in the third degree.

MISS HELLER: Assault in the third degree.

THE COURT: Which is a Class A misdemeanor.

MISS HELLER: Yes, sir.

THE COURT: Now, Arthur Drayton how old are you?

DEFENDANT DRAYTON: 17.

THE COURT: And Kenneth Washinton how old are you?

DEFENDANT WASHINGTON: 17.

THE COURT: I am going to talk to you boys. I call you boys because I am much older that you are and I have a son who could be your father, old enough to be your father, but I want you to understand what's happening here, and if either - - I am talking to both you, if either one of you doesn't understand what I am saying, raise your hand, so I will make it clear.

Did you understand what I have just said both of you?

DEFENDANT DRAYTON: Yes.

DEFENDANT WASHINGTON: Yes.

THE COURT: You have been Indicted here for the crime of attempted robbery in the second degree, both of you. You have a right to

a trial, no one can take that right away from you under any circumstances. At such trial you would not have to take the stand and testify and the District Attorney would have to produce witnesses and your lawyers would cross examine these witnesses, you would see the witnesses in Court and you could not be convicted unless they prove that you were guilty beyond a reasonable doubt.

Now, however, if you were convicted you could go to jail for seven years. Now, that doesn't mean that if you decided to go to trial and were convicted I would give you seven years, but I want you to understand the most you could get so that you know what you're doing.

Do you understand that?

DEFENDANT DRAYTON: Yes.

DEFENDANT WASHINGTON: Yes.

THE COURT: Now, if I take your plea, of assault in the third degree there is not going to be any trial. The next thing will be a sentence.

Do you both understand that?

DEFENDANT DRAYTON: Yes.

DEFENDANT WASHINTON: Yes.

THE COURT: Now, I cannot tell you what the sentence will be until I get a Probation Report. The Probation REport will tell me about your background, whether you have been good guys. And I am favorably impressed that your mothers are here, both are here so it looks to me the family unit of Drayton and Washington is a close knit unit.

However, you have got to understand that under the plea you are taking I could send you to jail for a year.

Do you understand that?

DEFENDANT DRAYTON: Yes.

DEFENDANT WASHINGTON: Yes.

THE COURT: Has there been any talk, Miss Heller - - I think I must state that these defendants are eligible youths.

MISS HELLER: I think so, but I think the Probation Department has to have that information.

THE COURT: I will get to that.

Now, the most I could sentence you to jail would be for a year, if I take this plea, but I can't make you any promise of any kind until I get the Probation Report. Now, there is another thing that you must know, the Court finds that each of you being under the age of 19, is an eligible youth, that means that if I get a favorable Probation Report and your lawyers ask for it and you plead guilty to assault in the third degree I can vacate that and you can plead guilty to being a youthful offender.

I can impose the same sentence as a youthful offender as I could if you plead guilty to assault in the third degree except that as a youthful offender you have no criminal record against you.

When you plead guilty to assault in the third degree you are pleading - - that plea stands, you have a criminal record of assault in the third degree.

Do you understand that?

DEFENDANT DRAYTON: Yes.

DEFENDANT WASHINGTON: Yes.

THE COURT: But you must understand more important than that I cannot make any promise as to what I will do. Are you both on bail?

THE DEFENDANT DRAYTON: Yes.

DEFENDANT WASHINGTON: Yes.

THE COURT: Are you on bail young man?

DEFENDANT DRAYTON: Yes.

THE COURT: I will continue your bail pending the sentence. But that sentence will be about a month from now and then I will decide what I will do.

But if I decide that I have to send you to jail for a year, I will not permit you then to withdraw your plea.

Do you understand that Mr. Drayton?

DEFENDANT DRAYTON: Yes.

THE COURT: And you Mr. Washington?

DEFENDANT WASHINGTON: Yes.

THE COURT: The lawyers all understand that the plea will stand.

Is anyone forcing you defendants to take this plea, Mr. Washington, Mr. Drayton, anyone force you to do it?

DEFENDANT DRAYTON: No.

DEFENDANT WASHINGTON: No.

THE COURT: Did anyone else make any promise to you as to what your sentence will be except what I just said to you?

DEFENDANT DRAYTON: No.

DEFENDANT WASHINGTON: No.

THE COURT: Are you entering this plea of you own free will?

DEFENDANT DRAYTON: Yes.

DEFENDANT WASHINGTON: Yes.

THE COURT: Have you, Mr. Washington, spoken to Mr. Tabacoff about this?

DEFENDANT WASHINGTON: Yes.

THE COURT: Before you entered the plea?

DEFENDANT WASHINGTON: Yes.

THE COURT: And Mr. Drayton, have you spoken to your lawyer before you entered the plea?

DEFENDANT DRAYTON: Yes.

THE COURT: Now, did you on August 18, 1972, assault a person named Wilfredo Fisher, did you Mr. Drayton?

DEFENDANT DRAYTON: Yes.

THE COURT: Did you Mr. Washington?

DEFENDANT WASHINGTON: No.

THE COURT: You did not?

DEFENDANT WASHINGTON: No.

THE COURT: Well, I can't take the plea.

MISS HELLER: There is two complainants.

THE COURT: I beg your pardon, I beg your pardon. There are two complainants.

MISS HELLER: The Indictment doesn't show it they used her as the witness as to what occurred.

MR. TABACOFF: There was an assault with the other girl that was present with the other complainant.

THE COURT: Mr. Washington, you tell me in your own words what happened at this time?

MR. WASHINGTON: I held a girl back I

told her to stay back because they were fighting.

THE COURT: You held the girl back?

DEFENDANT:WASHINGTON: Yes.

THE COURT: All right.

MISS HELLER: That plea is recommended.

THE COURT: The plea on both will will be accepted.

Take the plea, please.

THE CLERK: What is your name?

THE DEFENDANT DRAYTON: Arthur Drayton.

THE CLERK: Arthur Drayton is Mr. Nathan Schwartz who stands beside you your attorney?

DEFENDANT DRAYTON: Yes.

THE CLERK: Arthur Drayton do you now withdraw your plea of not guilty heretofore entered to Indictment Number 8218 of 1972, and do you now plead guilty to the offense of assault in the third degree a Class A misdemeanor to cover that indictment?

DEFENDANT DRAYTON: Yes.

THE CLERK: What is your name?

DEFENDANT WASHINGTON: Kenneth Washington.

THE CLERK: Is Mr. Seymour Tabacoff who stands beside you your attorney?

DEFENDANT WASHINGTON: Yes.

THE CLERK: Kenneth Washington, do you now withdraw your plea of not guilty heretofore entered to Indictment Number 8218/1972 and do you plead guilty to the offense of assault in the third degree a Class A misdemeanor to cover that indictment?

DEFENDANT WASHINGTON: Yes.

THE CLERK: Bail continued on both, your Honor.

THE COURT: Have you taken the plea from Drayton?

THE CLERK: Yes, from both.

THE COURT: Bail is continued.

Mrs. Washington, does Kenneth live at home with you?

MRS. WASHINGTON: Yes, sir.

THE COURT: Do you have other children?

MRS. WASHINGTON: Yes, sir; one other son.

THE COURT: Is your husband living?

MRS. WASHINGTON: Yes.

THE COURT: Does he work?

MRS. WASHINGTON: YES.

THE COURT: What sort of work does he do?

MRS. WASHINGTON: He works at Welbilt Corporation.

THE COURT: He supports the family?

MRS. WASHINGTON: YES, SIR.

THE COURT: And Mrs. Drayton, does Arthur live at home with you?

MRS. DRAYTON: Yes, sir.

THE COURT: Do you have other children?

MRS. DRAYTON: No, he is the only child.

THE COURT: Only child. Is Mr. Drayton at home?

MRS. DRAYTON: Yes.

THE COURT: What does he do?

MRS. DRAYTON: He works in the Post Office in the maintenance department.

THE COURT: All right, we will have to get a Probation Report, Mrs. Drayton and Mrs. Washington, and that will guide me as to what I will do.

Kenneth, do you have any prior criminal record?

DEFENDANT WASHINGTON: No, sir.

THE COURT: Do you, Arthur?

DEFENDANT DRAYTON: No.

MR. TABACOFF: If your Honor please he has no criminal record. He has a family court I told you about yesterday and he has a theft of service in the Criminal Court in Brooklyn.

I have the number because you had asked for it yesterday.

MISS HELLER: If counsel gives me the docket number, the theft of service being from a New York City Transit Authority here in Brooklyn, I would cover that theft of service.

THE COURT: Do you understand that, Mr. Tabacoff?

MR. TABACOFF: Yes. It's K314333 of 1973.

MISS HELLER: Thank you.

THE COURT: Kenneth, what did you try to get into a subway without paying the token?

DEFENDANT WASHINGTON: Yes, that's what they said.

THE COURT: That's what they say happened?

DEFENDANT WASHINGTON: Yes.

THE COURT: Tried to jump over the turnstile?

DEFENDANT WASHINGTON: No, I went through with somebody else.

THE COURT: You went through with somebody else?

DEFENDANT WASHINGTON: Yes, that's right.

THE COURT: That's a very serious case. It isn't to be excused, of course, but this is a nice case for the Supreme Court. Of course it isn't pending in the Court. This plea, Mrs. Washington, is going to take care

of the other case also.

MRS. WASHINGTON: Yes.

THE COURT: So that case will be over when we dispose of this case too.

What is the Family Court situation, what is that about?

MR. TABACOFF: It's over.

THE COURT: That's finished.

MR. TABACOFF: Yes, that was about three years ago.

THE COURT: That's personal need of supervision?

MR. TABACOFF: Juvenile delinquent.

THE COURT: Not based on any act involved here?

MR. TABACOFF: No.

THE COURT: That's finished.

MR. TABACOFF: Yes.

THE COURT: All we have pending is these two cases.

MISS HELLER: May I have the date when that's pending in Criminal Court.

MR. TABACOFF: June 13th. I understand.

that may be dismissed at that time.

THE COURT: Well, it will cover it in any event.

THE COURT: Do you know what part?

MR. TABACOFF: Part 3.

THE COURT: You tell the Judge in Part 3 when the case comes on, as to what has happened here if it becomes necessary Mr. Tabacoff. It may be dismissed anyhow, but if it isn't I am going to take that into consideration.

Mr. Schwartz, do you want to say something?

MR. SCHWARTZ: I have just been advised by Mr. Drayton that he was in the Family Court also for guidance. I understand that that matter was -- is finished and complete.

THE COURT: All right.

MR. SCHWARTZ: And no longer pending.

THE COURT: Date for sentence?

MISS HELLER: I think you need five weeks according to Mr. Landers now.

THE COURT: This is May 15, June 19th for sentence.

THE COURT: Now, Arthur you go to school, don't you?

DEFENDANT DRAYTON: Yes.

THE COURT: And you don't go to school, do you?

DEFENDANT WASHINGTON: Yes.

THE COURT: Now counsel, I don't want to take these boys away from school. If the 19th is a day in which they are going to be in school then one of you will come in here or send a representative down and say that the boys are attending school, then I will try to put it over for some day when they can conveniently make it. I don't want to take them away from school, or if they are here and you're here promptly at ten o'clock I will take their case up first.

MR. TABACOFF: Fine.

THE COURT: So that there will be no waiting around. Bail is continued

(Pedigree taken.)

SUPREME COURT OF THE STATE OF NEW YORK (Sentence)

COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

against

ARTHUR DRAYTON and KENNETH WASHINGTON,

Defendants.

Ind. #: 8218/72

Criminal Term: Part 5
Brooklyn, N.Y. 11201
August 27, 1973

B E F O R E:

HON. AARON KOOTA, Justice

A P P E A R A N C E:

IRVING SINGER, ESQ.
Attorney for Defendant Drayton
26 Court Street
Brooklyn, New York 11201

Harold Brown
Official Court Reporter

THE CLERK: Indictment 8218 of '72, Arthur Drayton and Kenneth Washington. Kenneth Washington previously sentenced this morning.

Arthur Drayton, will you identify yourself for the record, please?

MR. SINGER: Irving Singer ---

THE COURT: Are you Arthur Drayton?

DEFT. DRAYTON: Yes.

THE COURT: Is Mr. Singer your attorney?

DEFT. DRAYTON: Yes.

THE COURT: All right, arraign the defendant for sentence.

THE CLERK: What is your name?

DEFT. DRAYTON: Arthur Drayton.

THE COURT: Mr. Singer who stands beside you your attorney?

DEFT. DRAYTON: Yes.

THE COURT: Does counsel or the defendant wish to speak on behalf of the defendant?

MR. SINGER: I would like to speak in his behalf. Your Honor pleases, the defendant's mother is in court, and she works for the Manufacturer's Trust Company, and her husband

works for the Post Office. I'm sure the Probation report reflects a very, very fine family.

One of the reasons why I'm somewhat embarrassed in this case this morning, today, is that when this case first appearred on the trial calendar of this Court, it appeared before Judge Donnelly. And at that particular time, I told Judge Donnellyin all candor that my client was guilty and wished to make a clean breast of the thing.

The co-defendant who had another case pending, and had a previous criminal record, refused the -- refused to plead, he insisted upon a misdemeanor, and Judge Donnelly even promised us Probation, and I insisted that we take that plea, and told the co-defendant that if he didn't go along with that plea, he would testify against the co-defendant, and tell the truth as to what occurred.

The months passed, and there was a change of terms and finally, it -- appeared one day, and the co-defendant's attorney told me that there was no problem, because the District Attorney would now offer a misdemeanor.

We approached the bench. Itold Your Honor the background, that the boy had made a clean breast from the very first start, that he had made a mistake, that he had offerred to plead guilty.

In fact, he was even promised Probation by Judge Donnelly. He's only 17 years of age. I've spoken to the mother at great length, and as Your Honor probably knows, the boy was adopted when he was thirteen months old by his mother.

They are trying to do the best they could with him. They sent him to private schools, and very -- and I know that in the back of your mind must be the question of jail, because I know the co-defendant received a jail sentence. Your Honor remanded him this morning when I was engaged in another Court.

I think the fact that this boy from the very inception never tried to elude the Court, wanted to make a clean breast, was willing to testify against the co-defendant, and, had been offerred Probation, as a matter of fact, I was under the impression when I had told

Your Honor concerning the promise that was made by Judge Donnelly, you heard how candid, how open he was to testify against the co-defendant, I thought that Your Honor would go along with it, but I read the minutes this morning, when the plea was taken, and there Your Honor said what a fine family unit, you made no indication of any promise. And I searched my memory, but I know we just spoke of it.

However, he's only 17 years of age, he has good parents, and I know that if he had some type of supervision, that might do a lot more good, respectfully speaking, respectfully, Your Honor, than just committing him.

If you gave him the full year, he'd be out in eight months, and then he'd be totally under -- unspervised.

Now, the parents are willing to work with him, Your Honor. They sent him to private school, Catholic schools, they sent him to Delehanty School, and, I understand that his mother tells me that he is especially gifted child. He has a very, very high I.Q. Perhaps it's something that we can still do for him, if Your

Honor were to see fit to allow him to be put on Probation, strict Probation, supervised, and get back into the mainstream of society.

THE COURT: You want to say anything, young man? Do you want to say anything?

DEFT. DRAYTON: No.

THE COURT: Mrs. Drayton, do you want to say anything? You may say something, if you wish, Mrs. Drayton.

THE CLERK: This is the defendants mother. For the record, would you identify yourself, please, madam?

MRS. DRAYTON: My name is Anna Drayton. I'm the mother of Arthur.

THE COURT: Yes, Mrs. Drayton, what do you wish to say?

MRS. DRAYTON: I guess I think I'm so grateful for the Probation. I believe it would help him that if he's under strict Probation, my husband and I both were going along a hundred per cent with it. I think it would be more of a lesson to him than prison.

I think Probation would be good for him. I would be grateful.

THE COURT: Mrs. Drayton, my sympathies go out entirely to you, not to your son - to you and your husband. The Probation report shows that you are high-minded, responsible citizens of our community. We are grateful we have such people as you and your husband living in our community.

MRS. DRAYTON: Thank you.

THE COURT: It's always the parents that have to suffer when children get into trouble. I have a responsibility, Mrs. Drayton, I have a responsibility to the community.

Now, when your son was 17 years old, he appearred in Juvenile Court. No, when he was under 16, for the theft of soda which resulted in Probation, but Probation didn't work out. They had to release him from Probation.

He earlier had been brought to Court for demanding someone else's money from a 15 year old boy. And, they indicate that your son has failed to measure up to your standards, the standards that you've set of decent, law-abiding citizens.

He presently attends high school in the twelfth grade where his marks have shown a deterioration, as he's begun acting out. Truancy, neglecting his studies. He's held only one summer job. Under pressure from his group, the fellows he's been hanging around with, he's begun to experiment with heroin, initially snorting, progresses to mainlining. Claims to have terminated the use.

MRS. DRAYTON: Your Honor, may I say something?

THE COURT: Yes.

MRS. DRAYTON: Yes, I will admit that, but I must say that there's no indication of any drugs, or anything now, and we feel very grateful, because we believe that he has done this on his own. And I think if he can do that, that he is able to do anything that he wants to do, and I'm sure that as to drugs, that, he did -- he experimented with, as they say.

THE COURT: That's -- there's no indication that he is a drug addict.

MRS. DRAYTON: Just experimented.

THE COURT: He broke the habit.

MRS. DRAYTON: Yes, sir. And he wanted to do it, we were so grateful, and I'm sure if he did that, that he will, I believe that he will do ---

THE COURT: Mrs. Drayton, I have responsibility to the community. I have to protect the community. The only thing that's going to help this young man is a jail term.

The sentence of the Court is that the defendant is -- first, Youthful Offender treatment is denied to the defendant. The defendant is sentenced to the New York City Department of Corrections for a period of one year. Defendant is remanded. Advise the defendant of his right to appeal.

THE CLERK: Mr. Drayton, please hear your notice. You are advised that you have the right to appeal from the sentence just imposed upon you by filing a notice of appeal with the Clerk of this Court in duplicate within 30 days from this date. A similar notice must be served on the District Attorney of Kings County.

If you cannot afford to retain counsel

for this purpose, you may apply to the Appellate Division of the Second Department and request that counsel be assigned to you for the purpose of prosecuting your appeal.

Defendant is remanded.

MR. SINGER: Your Honor pleases.

THE COURT: Mrs. Drayton, do you want to speak to your son for a moment or two before they take him away? Do you want to speak to him here?

MR. SINGER: Before these proceedings are terminated, I know the Probation report must also indicate that there is another charge that has just developed and returnable September 7. Can I impose upon Your Honor to also take that into consideration?

THE COURT: What was that charge, Mr. Singer?

MR. SINGER: This is a charge of

THE COURT: Just a moment, just a moment.

MR. SINGER: Well, it's burglary, petit larceny and criminal possession. However,

the facts indicated that he was carrying a carton of ravioli, and that the -- this carton was last seen in a truck. Assuming whoever it was transporting the quantity of ravioli.

He was charged with a theft of that box. However, I understand that the contents feel they don't make out a good case, as they were going to withdraw in view of the fact that Your Honor gave him a year, and I have a copy of the complaint.

If Your Honor will take that into consideration also in this sentence, so I may report that back and terminate that matter.

I have a copy of the complaint of Your Honor wishes to glance at it.

THE COURT: May I see it?

MR. SINGER: Surely.

THE COURT: It's on the assumption that the complaint, a copy of which Mr. Singer has shown to me which indicated that the defendant was observed by a driver of a truck. Defendant was observed carrying a carton of ravioli, which was on the truck before the defendant was observed carrying it.

If those are the facts of the case, the Court will take that into consideration. And while I have no jurisdiction over the complaint pending in the Criminal Court, you may tell the judge in the Criminal Court, that I have taken that into consideration in imposing this sentence.

MR. SINGER: Thank you very much.

THE COURT: But of course, when I say that, it's not intended to bind the judge in the Criminal Court in the slightest.

MR. SINGER: I understand that, Your Honor.

THE COURT: All right.

MR. SINGER: Thank you.

I certify that the foregoing is a true and accurate transcript of the minutes.

/S/ HAROLD BROWN

Harold Brown
Official Court Reporter

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

ARTHUR DRAYTON

Petitioner

-against-

THE PEOPLE OF THE STATE OF NEW YORK, EUGENE GOLD, et al.

Respondents

----------X

AFFIDAVIT

Index Number
F 6 C 1713

STATE OF NEW YORK)
COUNTY OF KINGS) SS:

FRANKLIN L. CARROLL, III, being duly sworn, deposes and says:

That he is an Assistant District Attorney in the County of Kings. This affidavit is submitted, along with an accompanying Memorandum of Law, as the response of the Kings County District Attorney, who is named as a party in this application for a writ of habeas corpus. On personal knowledge, and on information and belief, based on a study of the records and files of the District Attorney's Office in this matter, the facts in this case are:

STATEMENT OF FACTS

Arthur Drayton and another, who is not a party to this action, were accused by Kings County Indictment Number 0218 of 1972 of: Attempted Robbery in the Second Degree (two counts), and Assault in the Second Degree. All the charges arose out of an incident which occurred on August 18, 1972. All counts charged were class D felonies, punishable by a term of imprisonment not to exceed seven years. Penal Law §§110.00, 160.10, 110.05 [3], 120.05, 70.00 [2] [d].

On May 15, 1973, Drayton entered a plea of guilty to Assault in the Third Degree, a class A misdemeanor, in satisfaction of the indictment (63c).* In support of her recommendation that

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*The numbers in parentheses refer to the black numerals on the bottom of the record submitted by the Petitioner to this court.

the plea be accepted, the Assistant District Attorney opined that after interviewing the complaining witnesses, she had determined Attempted Robbery in the Second Degree to be an improper "disposition" of the case (63d). Further, she characterized the incident as " ... an assault in the Third degree at the most." (63d).

At no time during the taking of the plea, did the defense counsel request to withdraw the guilty plea, in light of the remark passed by the Assistant District Attorney, and seek to have the charges in the indictment reduced. Nor did the Assistant District Attorney make any such motion. Nor did the court reduce the charges in the indictment on its own motion -- distinct, that is, from accepting the plea of guilty to dispose of the indictment (63d, 63a -- 63s).

The court explained to Drayton that as a result of his plea he might receive a sentence of one year in prison, though lesser punishment as a youthful offender was a possibility. The court further explained that it would make no promise concerning the sentence to be given because it had not yet studied the probation report (63h). Then Drayton acknowledged assaulting a person named Wilfredo Fisher on August 18, 1972 (63k).

At sentencing, on August 27, 1973 (64), following the requests by the defendant's mother and his attorney that Drayton be given probation (65-70), the court observed that this incident was far from Drayton's first brush with the law (70). Drayton had twice appeared in Juvenile Court; the first, for demanding money from a fifteen year old boy; the second, for stealing soda (70). This second charge led to Drayton's being placed on probation (70). In high school, Drayton was a truant; he had neglected his studies, and his grades had deteriorated (71). While associating with an unsavory group, Drayton had begun experimenting with heroin (71). In stages, he had progressed to mainlining the drug, though he appeared no longer to be using it at the time he was sentenced in this case (71). Further, the court noted that Drayton had profitted little from the fine example his parents had set for him (70-71).

In light of the petitioner's background and personal history, the court denied Drayton youthful offender treatment, and sentenced him to one year in prison (72).

Drayton did not appeal his sentence or his conviction. But in October of 1973, he brought a motion to set aside his sentence on the ground that the statute under which he was sentenced violated the equal protection clause of the Fourteenth Amendment. This motion was denied by the sentencing Judge in a decision dated November 27, 1973. The Appellate Division permitted Drayton to appeal the denial of that motion. Later, it granted him permission to file late an appeal from his conviction, and he did so.

The Appellate Division, Second Department on April 28, 1975, unanimously affirmed the lower court's two orders, four justices concurring in a memorandum opinion, and one justice concurring specially. 47 A.D. 2d 952 (2d Dept. 1975).

Next, the defendant moved for reargument and reconsideration of the appellate court's decision. That motion was denied in an order dated May 30, 1975.

The Court of Appeals affirmed the Appellate Division's decision. 39 N.Y. 2d 580 (1976). Petitioner next moved for reargument in the Court of Appeals; the motion was denied July 13, 1976. Now, petitioner brings this application for a writ of habeas corpus.

Sworn to before me this
27 day of September, 1976

FRANKLIN CARROLL III

MARY M. BAKER
Notary Public, State of New York
No. 30 4502281 Qual. in Nassau County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -X

ARTHUR DRAYTON,

Petitioner

-against-

THE PEOPLE OF THE STATE OF NEW YORK, EUGENE GOLD, et. al.,

Respondents.

- -X

76 C 1713

MEMORANDUM OF LAW

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PRELIMINARY STATEMENT

This Memorandum of Law is submitted by the Kings County District Attorney in opposition to Petitioner Arthur Drayton's application for a writ of habeas corpus.

ARGUMENT

THE STATUTORY SCHEME UNDER WHICH DRAYTON WAS SENTENCED CONFORMS TO THE FOURTEENTH AMENDMENT'S REQUIREMENTS BECAUSE ITS CLASSIFICATIONS ARE REASONABLE.

New York law requires* youthful offender treatment for an eligible youth, not previously convicted of a crime or adjudicated a youthful offender, who is convicted in a local criminal court. CPL Section 720.20 (1) (b), L. 1971, c. 981, Section 1. Eligible youths, as defined in CPL Section 720.10 (1) and (2), L. 1971, C. 981, Section 1, who are entitled automatically to youthful offender treatment under Section 720.20 (1)(b), L. 1971, c. 981, Section 1, may not be sentenced to a term of imprisonment in excess of six months. CPL Section 720. 25, L. 1971, c. 981, Section 1. Local

*Much of the law which controlled the sentencing of youthful offenders at the time of Drayton's crime, August 18, 1972, has since been amended or superseded. Often the modified legislation carries the same section number within the Criminal Procedure Law (hereafter: CPL). Where such is the case, the citation to the statute by section in the CPL is accompanied by the relevant citation to the session laws. Where the statute which governed Drayton's case is still in force the only citation given is by section in the CPL. In either event the law controlling youthful offender adjudications at the time of Drayton's crime continues to govern his case, since the subsequent legislative changes in this area have been prospective only in their application: consequently, statutes of both sorts will be discussed in this memorandum in the present tense.

Criminal courts may try only misdemeanors and petty offenses; they lack the authority to try felonies. CPL Section 10.30 (1) and 10.20 (1) (a). Thus, the legislature in drafting CPL Section 720.20 (1) (b), L. 1971, c. 981, Section 1, assured that the class of eligible youths automatically to be accorded youthful offender treatment and six months maximum sentences would contain no one accused of any crime more serious than a misdemeanor.

In all other situations the decision whether or not to accord the eligible youth treatment as a youthful offender is left to the trial court's discretion. CPL Section 720.20 (1) (a), L. 1971, c. 981, Section 1. (These situations chiefly involve: eligible youths who are indicted for a felony; and eligible youths, accused of a misdemeanor or petty offense, who have been in the past either convicted of some crime not a felony, or adjudicated a youthful offender. CPL Sections 720.10 (1) and (2), 720.10 (1), L. 1971, c. 981, Section 1, and CPL Sections 10.20 (1) (a) and 10.30 (1).) Such youths, if accorded youthful offender treatment, are to be sentenced in the manner authorized for the criminal act for which the youthful offender finding was made, with the proviso that indeterminate sentences of imprisonment cannot be imposed. CPL Sections 720.25 (a), L. 1971, c. 981, Section 1. (Since felonies, generally, are punishable in New York by the imposition of indeterminate sentences, Penal Law Section 70.00 (1), the result of the statutory scheme is to provide that youthful offenders convicted of a felony receive a definite prison sentence of one year or less under Penal Law Section 70.05 (1), or indefinite reformatory sentences with maximum limits of three or four years under Penal Law Section 75. 10 (1), L. 1965, c. 1030, and 75.20 (4), L. 1965, c. 1030. See R. Denzer, "Practice Commentary," to CPL Section 720.25 L. 1971, c. 981, Section 1,

McKinney's Consolidated Laws of New York Annotated, Book 11A, pps. 323-325.)

Eligible youths who meet the requirements of CPL Section 720.20 (1) (b), L. 1971, c. 981, Section 1, and for whom youthful offender treatment is mandatory upon conviction, are not entitled to a jury trial. CPL Section 340.40 (7). Rather they are tried before a single judge, CPL Section 340.40 (7). The maximum sentence of incarceration they may receive in six months. CPL Section 720.25 (b) (ii), L. 1971, c. 981, Section 1. Whether a youth meets the requirements of CPL Section 720.20 (1) (b), L 1971, c. 981, Section 1, can, of course, be determined prior to trial.

On the other hand, eligible youths who fall within the class defined by CPL Section 720.20 (1)(a), L. 1971, c. 981, Section 1, for whom youthful offender treatment after conviction is a decision left to the court's discretion, are under no such constraint. When they are charged with a crime for which the legislature has authorized as punishment incarceration which may exceed six months, they must be accorded a jury trial. Baldwin v. New York, 399 U.S. 66 (1970). It is a long standing policy of New York's to avoid burdening its courts with the necessity of jury trials for non-criminal youthful offender adjudications. New York State Legislative Annual 1971, c. 981, p. 242. See CPL Section 720.35

This, at any rate, is a brief sketch of the statutory scheme under which Drayton was sentenced. The way his case fit within it was this:

Arthur Drayton was accused by the Kings County grand jury of two counts of Attempted Robbery in the Second Degree, and one count of Assault in the Second Degree, all of which are class D felonies. Penal Law Sections 110.05 (3), 160.10 and 120.05. Since

felony charges were involved, jurisdiction to try the case was vested exclusively in the superior court, where the case was assigned. CPL Section 10.20 (a) and 10.10 (2) (a). There, Drayton, facing a possible sentence of seven years in prison, was entitled to a jury trial. Baldwin v. New York, supra, Penal Law Section 70.00 (2) (d). There, Drayton was convicted, by a plea of guilty to Assault in the Third Degree, a class A Misdemeanor, which was offered and accepted in satisfaction of all charges in the indictment. CPL Section 10.20 (1) (b), Penal Law Section 120.00. Consequently, Drayton was not within the statutory classification drawn by CPL Section 720.20 (1) (b), L. 1971, c. 981, Section 1, entitled automatically to youthful offender treatment and a six month maximum sentence, despite his meeting two of the statute's three requirements in that he was of the appropriate age and had no prior criminal convictions or youthful offender adjudications. Drayton's situation fell within the class drawn by CPL Section 720.20 (1) (a), L. 1971, c. 981, Section 1, and whether he would be accorded youthful offender treatment was discretionary with the court.

The court, after reviewing Drayton's record, and the probation report, denied him youthful offender treatment, and sentenced him to one year in prison, the maximum sentence for a class A misdemeanor. Penal Law Section 70.15 (1).

The Petitioner, Arthur Drayton, now complains that the line drawn by CPL Section 720.20 (1) (b), L. 1971, c. 981, Section 1, denies him the right to equal protection of the law guaranteed by the fourteenth amendment and the New York Constitution, Article 1, Section 11. He argues that the statute and the sentencing scheme of which it is a part, in providing that convicted misdemeanants receive different treatment at sentence depending on the court

where the conviction is obtained, classifies without any rational relationship to a legitimate state purpose. Appellant's Brief, pps. 13-21. (Appellant appears to concede, as he did in the state courts, that the "rational basis test" provides the applicable standard by which the statute is to be judged, and not the higher standard, which is reserved for scrutinizing suspect classifications, e.g. race, and statutes which impinge on fundamental rights, e.g. the right to travel. See Drayton's Petition at pps. 8,9, 10-12). As relief Drayton requests this court to hold that the statute under Section 1, is unconstitutional, as least as applied to him so that his maximum sentence will be reduced to six months, and his criminal record sealed. CPL Section 720.20 (1) (b), L. 1971, c. 981, Section 1, CPL Section 720.25, L. 1971, c. 981, Section 1, CPL Section 720.35. Drayton's Petition, p. 1.

The People urge this court to conclude that the statute classifies reasonably in order to promote judicial efficiency, a legitimate state purpose. It is the People's contention that the statute is in fact carefully drawn to achieve this purpose.

Legislation is constitutional under the equal protection clause of the fourteenth amendment if there is a rational basis for the legislative classification. Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (Upholding against equal protection and due process challenges an Oklahoma statutory scheme which made it illegal for an optician to fit, duplicate, or replace lenses for human use unless prescribed in writing by a licensed optometrist or opthalmologist, but which exempted from regulation sellers of ready-to-wear glasses.); Railway Express Agency v. New York, 366 U.S. 106 (1949)

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purpose of which was to promote judicial efficiency by streamlining the procedures for youthful offender adjudications. Thus, the classification drawn by CPL Section 720.20 (1) (b), L. 1971, c. 981, Section 1, defines a group of youthful first offenders none of whom are charged with any crime more serious than a class A misdemeanor, and none of whom, by hypothesis, can be found guilty at trial of any felony. CPL Sections 10.30 (1) (a) and (b), 720.20 (1) (b), L. 1971, c. 981, Section 1. Their cases are to be expeditiously processed through the judicial system without burdening the system by requiring the case to be tried before a jury. CPL Section 340.40 (1), New York State Legislative Annual, 1971, c. 981, pps. 241-243 and pps. 590-591. These youths may not receive a sentence of incarceration which exceeds six months. CPL Section 720.25 (b) (ii), L. 1971, c. 981, Section 1.

Companion portions of the legislative revision of the youthful offender article eliminated the prior law's requirement for numerous probation reports as an adjunct to prosecutions against eligible youths. "Under the (prior) Criminal Procedure Law's youthful offender structure, a court must determine whether an eligible youth shall or shall not be adjudged a youthful offender prior to the entry of a plea of guilty or not guilty to the crime charged. To make this determination, the Criminal Procedure Law permits and in many instances, requires court to order a pre-pleading probation report of the youth. If the youth is convicted either as a youthful offender or as an adult, a second, updated probation report is normally necessary. If the case against the youth is ultimately dismissed or if he is acquitted of the charge, then the pre-pleading probation report was an exercise in futility and a waste of probation resources.

"By providing for the determination of youthful offender status as an incident of the sentencing process, only one probation report

need be compiled and no unnecessary probation reports will be occasioned." New York State Legislative Annual, 1971, c. 981 at pps. 241-242. (Governor's Memorandum to the legislature upon submission of the proposed revision in CPL Article 720 and Section 340.40). The statute which accomplishes this more efficient allocation of limited probation department resources by shifting the time for determining whether or not to extend youthful offender treatment from the time of pleading to the time of sentence after conviction is CPL Section 720.20 (1) (a), L. 1971, c. 981, Section 1. This is the statute under which Drayton was sentenced. (Manifestly, there existed a state of facts justifying this legislative classification; and, the statute is reasonable. Dandrige v. Williams, supra, 397 U.S. at 485.)

A principal factor behind New York's extensive revision of the youthful offender article of the CPL in 1971 was the decision of the Supreme Court of the United States in Baldwin v. New York, supra, which held that if the authorized sentence of imprisonment for an offense exceeds six months a jury trial is required by the Constitution. Prior to the enactment of L. 1971, c. 981, Section 1, the CPL required that all youthful offenders tried in a local criminal court be tried without a jury. New York State Legislative Annual, 1971, c. 981, p. 242. It also authorized a term of incarceration upon conviction of the same duration as that prescribed for the underlying criminal charge. New York State Legislative Annual, 1971, c. 981, p. 242. It has been a long-standing policy of the State of New York to avoid "burdening its courts with the necessity of jury trials in non-criminal youthful offender adjudications." New York State Legislative Annual, 1971, c. 981, p. 242. But in the wake of the Baldwin decision, this policy had run afoul of the right

to a jury trial, at least as it applied to youths accused of class A misdemeanors and unclassified misdemeanors which authorized as punishment, incarceration in excess of six months.

Thus, the purpose of that portion of L. 1971, c. 981, Section 1, which is found in CPL Sections 720.20 (1) (b), 720.25 (b) (ii) and 340.40 (7), is to strike a sensible balance between the right to a jury trial and the crying need in New York for the expeditious processing of court cases by avoiding the necessity of having jury trials in a large class of cases, where the crimes involved are not exceedingly serious. New York State Legislative Annual, 1971, c. 981, at pps. 242-243, and at pps. 590-591. The promotion of judicial efficiency is indisputably a legitimate state purpose.

It was reasonable of the legislature to conclude that holding a trial by jury entailed a certain amount of delay in disposing of simple cases involving less serious crimes. In this context, it should be noted that legislation whose constitionality is evaluated under the reational basis test is presumed constitutional: the burden of proof lies on the party seeking to have the statute declared invalid. Railway Express Agency v. New York, supra, 336 U.S. at 109. In the state proceedings the defendant never offered evidence to contradict this, the implicity premise of the legislation he now attacks. In the absence of evidence in the Record demonstrating that this premise is wholly without merit; the legislature's judgment in this matter is to be accepted by the reviewing court on appeal. Railway Express Agency v. New York supra, 336 U.S. at 109.

The classification drawn by the legislature in CPL Section 720.20 (1) (b), L. 1971, c. 981, Section 1, is a reasonable one. It assures that no one accused of any crime more serious than a

class A misdemeanor will automatically receive youthful offender treatment and the relatively lenient sentence maximum of CPL Section 720.25 (b) (ii), L. 1971, c. 981, Section 1, while at the same time assuring that those accused of serious crimes will have the opportunity to be tried before a jury. The principal effect of the distinction drawn by the statute is to differentiate between accused felons and accused misdemeanants. (See CPL Sections 10.10 and 10.20). In light of the widespread practice of "plea bargaining", to dispose of criminal charges in this state, see e.g. Santobello v. New York, 404 U.S. 257, 260 (1971), the legislature might reasonably conclude that the disposition of a charge, ultimately reached in court, might not always accurately reflect the social harm caused by the defendant's conduct. Consequently, it was not irrational for the legislature to make the degree to which the relatively lenient youthful offender treatment is available turn, in part, on the nature of the original accusation.

There is significant authority upholding legislative distinctions based on the fact of an indictment where, as here, the classifications's consequences effect the potential term of incarceration. Thus, 18 U.S.C. Sections 922 (h) (1) and 924 (a), make it a federal crime, punishable by five years in prison, for anyone under indictment for a crime punishable by a term in prison exceeding one year to receive a firearm or ammunition which has been shipped in interstate commerce. In United States v. Craven, 478 F. 2d 1329 (6th Cir., 1973), cert. denied, 414 U.S. 866, (1973), reh. denied, 414 U.S. 1086, (1973), the constitutionality of that statute was upheld against an equal protection attack. First, the court noted that decisions of the Supreme Court have held that

amendment, which applies to the states, is a part of the guarantee of due process in the fifth amendment, which applies to the federal government. United States v. Craven, supra, at 1338. Then, the court held that the statute's classification was permissible. United States v. Craven, supra, at 1339-1340. The court in Craven, supra, relied in large measure on United States v. Thoresen, 428 F. 2d 654 (9th Cir. 1970), which upheld against a similar equal protection-due process attack similar legislation making it a federal crime for anyone under indictment for a crime the punishment for which exceeds one year to ship firearms or ammunition in interstate commerce. United States v. Thoresen, supra, at 661-662. Taken together, both cases hold that it is permissible for the legislature to attach significance to the fact of indictment in fashioning punishment. See also, Jeffery v. Malcolm, 353 F. Supp., 395 (S.D.N.Y., 1973) (Upholding against an equal protection attack a New York scheme which permitted convicted felons to accumulate a good time credit amounting to a significantly larger fraction of their sentences than could convicted misdemeanants.)

Thus, since the statute, CPL Section 720.20 (1) (b), L. 1971, c. 981, Section 1, represents a reasonable legislative choice to achieve a legitimate purpose, its constitutionality should be upheld. "...Our decisions do not authorize courts to pick and choose among legitimate legislative aims to determine which is primary and which is subordinate. Rather, legislative solutions must be respected if the distinctions drawn have some basis in practical experience....or if some legitimate state interest is advanced....Permitting nullification of statutory classifications based rationally on a non-primary legislative purpose would allow courts to peruse legislative proceedings for subtle emphasis supporting subjective impressions and preferences. The Equal Protection Clause does not countenance such speculative probing into the purposes of a co-ordinate branch," wrote Mr. Justice Powell in McGinnis v. Royster, supra, 410 U.S. 276-277. Thus, the legislation must be upheld even if judicial efficiency were not its primary purpose. All that is necessary is that the promotion of judicial efficiency be a purpose, and that the statute be rationally related to achieving that purpose. It is not necessary for the Court to agree that the legislation is wise to uphold its constitutionality; "the Fourteenth Amendment gives the...courts no power

to impose upon the States their views of what constitutes wise ...social policy." Dandridge v. Williams, supra, 397 U.S. 471, 486 (1970).

Indeed it is worthy of note how well this statute does achieve its purpose. The inclusion in the mandatory youthful offender category of CPL Section 720.20 (1) (b) L. 1971, c. 981, Section 1, of those eligible youths ultimately convicted in the Supreme Court of no crime more serious than a misdemeanor would not promote the statutory purpose of avoiding time-consuming jury trials. For the situation could only arise in one of three ways: One, the defendant was entitled to a jury trial, exercised his right, and was convicted, in which case inclusion under the mandatory sentencing provisions would be useless, since the purpose of the statute would have already been defeated. Two, the defendant was entitled to a jury trial, but chose to waive the right, in which case inclusion in the statutory scheme is unnecessary to achieve the statutory purpose. Third, the defendant was indicted for a lesser misdemeanor, the possible punishment for which is not sufficiently severe to entitle him to a jury trial, in which case inclusion in the statutory scheme is again unnecessary to achieve the legislative purpose. Defendant Drayton's situation falls in the category "Two", above, since he waived his right to a jury trial when he pleaded guilty. His case was in the Supreme Court because he had been indicted for felonies! Thus, the defendant complains of his exclusion from a classification, CPL Section 720.20 (1) (b), L. 1971, c. 981, Section 1, which receives

a benefit denied him (automatic youthful offender treatment). But he ignores that that class is under a disability (trial without a jury) which he did not face. His argument ignores the quid pro quo involved in the statutory scheme, cf Carter v. United States, 306 F. 2d 283 (D.C. Cir.; 1962). (upholding the constitutionality of the Yourth Correction Act, 18 U.S.C. Section 5010 (b) (1958), which in some circumstances permitted a youth to be incarcerated for a longer time than an adult could be for the same crime. That the confinement was to be in special rehabilitative facilities constituted a quid pro quo, which justified the potentially longer restriction on liberty.)

Indeed, there are some hard cases one can imagine under this statute: a defendant whose case was in a superior court because he was indicted for a class A or B misdemeanor; or, a defendant who went to trial on an indictment accusing him of felonies, and was convicted of a misdemeanor only. Both situations are distinguishable from that involved in this one, where Drayton was convicted by a plea of guilty, and perhaps ought to be left for another day. Still, it should be recalled that we do not deal with a statute which precludes youthful offender treatment, if the conviction is in a superior court; rather, it merely makes youthful offender treatment discretionary with the sentencing judge. CPL Section 720.20 (1) (a), L. 1971. c. 981. Section 1. Administrative convenience justifies the drawing of some fine distinctions of Marshall v. United States, ____U.S.____ , 94 S. Ct. 700 (1974). (Upholding against equal protection and due process challenges the two felony exclusion provision of the narcotics Addict Rehabilitation Act 18 U.S.C. Section 4251 (f) (4). The Court noted that the line might as well have been drawn at one prior conviction,

or three). Legislation need not be drawn with geometric precision to be consistent with the fourteenth amendment. Williamson v. Lee Optical, supra, 348 U.S.at 489.

Now, the defendant, both in the state courts and in this court, makes much of a remark by the Assistant District Attorney in the trial part, when the defendant's plea of guilty was entered, to the effect that Drayton should never have been indicted for the felonies of Attempted Robbery in the Second Degree and Assault in the Second Degree. It should be noted that while Assistant District Attorneys have much power, they do not have the authority to dismiss an indictment; that is a judicial act. The Assistant District Attorney's remark in this case did not nullify the grand jury's decision to indict for felonies. Neither the District Attorney nor the defense counsel moved to dismiss the indictment or reduce its charges. Nor did the court take any such action on its own motion. The integrity of the grand jury's decision still stands, unimpaired by any judicial determination of the indictment's insufficiency. (Of course, the defendant's plea "disposed of" the indictment, CPL Section 220.30 (2). But it did not negate it. Were the defendant successfully to move to withdraw his guilty plea, he would face trial on all the charges contained in the indictment at the time the plea was offered. CPL Section 440.10 (7), and the remark of the Assistant District Attorney who accepted the plea would not prevent the District Attorney from trying the case, since no one is bound by representations of his agents beyond both their actual and their apparent authority.) This defendant was tried in Supreme Court because of the grand jury's decision to indict him for felonies. In this sense the indictment remains a significant aspect of this case.

CONCLUSION

THE APPLICATION FOR A WRIT OF HABEAS CORPUS SHOULD BE DENIED.

Dated: Brooklyn, New York
September, 1976

Respectfully submitted,

EUGENE GOLD
District Attorney
Kings County

FRANKLIN L. CARROLL, III
Assistant District Attorney
of Counsel.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ARTHUR DRAYTON,

Petitioner,

- against -

THE PEOPLE OF THE STATE OF NEW YORK, EUGENE GOLD, DISTRICT ATTORNEY AND LOUIS J. LEFKOWITZ, ATTORNEY GENERAL STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS OF THE CITY OF NEW YORK AND BENJAMIN MALCOLM, COMMISSIONER, ARTHUR RUBIN, WARDEN OF RIKERS ISLAND,

Respondents.

Docket No. 76 C 1713

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DISTRICT ATTORNEY
KINGS COUNTY, N.Y.

MEMORANDUM OF LAW
IN SUPPORT OF PETITION
FOR HABEAS CORPUS

FACTS

Petitioner was indicted, charged with attempted robbery, second degree, two counts, and assault, second degree, one Count. On May 15th, 1973, petitioner, with counsel, appeared before the Criminal Term of the Supreme Court, Kings County, and asked leave to withdraw a previous plea of not guilty, and to plead guilty to assault, third degree. The assistant District Attorney, pointing out that the plea was guilty to a misdemeanor, recommended acceptance, stating, for the record, that it had been determined, by the prosecution, that, based upon statements of the two complaining witnesses, the charges, in the indictment, were unjustified, and that, "This is an assault in the third degree at the most." It was ascertained that petitioner was seventeen years old and eligible for youthful offender treatment. The plea of guilty to the misdemeanor was accepted.

On August 27, 1973, petitioner was arraigned for sentence. The Court denied youthful offender treatment, and sentenced petitioner to one year's imprisonment.

Petitioner moved for resentence as a youthful offender claiming unconstitutionality of the statutory scheme by virtue of which he had been denied youthful offender treatment as a matter of right. Primarily, he attacked the statutory scheme upon the ground that this denial was based

entirely upon his having been accused and sentenced in the Supreme Court. Had the identical conviction been rendered in the New York City Criminal Court, it is beyond dispute that he would have been entitled to youthful offender treatment as a matter of right. Petitioner added that the prosecution had conceded that he should have been charged in the New York City Criminal Court, rather than in Supreme Court.

The prosecution opposed the motion for resentence, arguing that the statutory scheme, under which petitioner was sentenced, furthered judicial efficiency.

The Criminal Term denied the motion, holding that there was a rational basis for the difference in treatment of otherwise eligible youths, provided, in the statute, for the different courts. The rational basis was described, by the Criminal Term, as "the nature of the original criminal accusation or charge".

QUESTION PRESENTED

Has petitioner been denied due process, and the equal protection of the law, by the Court's denial of youthful offender treatment as a matter of right, merely because he was originally accused in the Supreme Court rather than in the New York City Criminal Court where, it was conceded, the accusation should have been made?

POINT I

PETITONER HAS BEEN DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES. THE STATUTORY SCHEME, BY VIRTUE OF WHICH HE HAS BEEN DENIED YOUTHFUL OFFENDER TREATMENT, AND A SENTENCE OF SIX MONTHS MAXIMUM, IS UNCONSTITUTIONAL.

CPL 720.20 provided that a youthful offender may be relieved "from the onus of a criminal record." (subd. 1a). The same section provided that "where the conviction is had in a local criminal court and the eligible youth has not prior to commencement of trial been convicted of a crime or found a youthful offender, the court must find he is a youthful offender". (subd. 1b). The same section provided, further, that, "upon determining that an eligible youth is a youthful offender, the court must direct that the conviction be deemed vacated and replaced by a youthful offender finding; and the court must sentence the defendant pursuant to Section 720.25". (subd. 3). In Section 720.25, at subdivision (b) (ii), there was a provision prohibiting a sentence of imprisonment exceeding six months.

It may be noted that CPL 720.20 was amended in 1974, and CPL 720.25 was repealed. According to McKinney's 1974 Supplementary Practice Commentary, "Sentencing of youthful offenders is now governed exclusively by Penal Law §§60.01, 60.02 and 60.03 and the sections which they, in turn, incorporate by reference." Neither the amendments

to CPL 720.20, nor the repeal of CPL 720.25, have any effect on the merits of this appeal.

From the pertinent provisions of the applicable statutes, it clearly appears that petitioner would have been entitled to youthful offender treatment, as a matter of right, if:-

1. The conviction were had in a local criminal court, and

2. If the petitioner were an eligible youth; and

3. If petitioner had not, prior to the commencement of trial, been convicted of a crime or found a youthful offender.

Petitioner was found, by the Court, to be an eligible youth. The only prior contacts of petitioner with law enforcement were in Juvenile Court. It is well established that an adjudication of juvenile delinquency is not a conviction. R. v. Ploskitt, 34 A.D. 2d 402. Petitioner had not been found, previously, to be a youthful offender, and there is no claim of any such finding in the record.

The only condition, therefore, which might justify the denial of youthful offender treatment, to petitioner is, thus, the first listed condition above. This is the requirement of the conviction having been had in "a local criminal court". "Local criminal court" is defined in CPL, Sec. 10.10 (3). A number of categories are listed. Two categories are pertinent. "Local criminal court"

means The New York City Criminal Court (CPL 10.10 (3(b)); and "Local criminal court" means "A supreme court justice sitting as a local criminal court" (CPL 10.10 (3(f)). In denying youthful offender treatment to petitioner, the sentencing Court has obviously held that he was not "sitting as a local criminal court", and since conviction was not had in the New York City Criminal Court, the "local criminal court" condition was not met. It is petitioner's contention that, if such finding can be made under the CPL statutory scheme, then this statutory scheme is unconstitutional since it has deprived him of the equal protection of the law.

The prosecution conceded that the facts, attested to by the complaining witnesses, revealed that petitioner should have originally been charged with a misdemeanor rather than a felony. Presumably, other defendants, committing the same violation under the same circumstances, would be charged with misdemeanors only, after the prosecutor had interviewed complaining witnesses prior to the indictment. Defendants, charged with misdemeanors, would ordinarily be prosecuted in a local criminal court (Cf.CPL 10.30). Such defendants, in all other respects in the same circumstances as petitioner, would be entitled to youthful offender treatment as a matter of right, having met all three conditions. Obviously, petitioner, due to sheer error in procedure of the prosecution, has been prosecuted in other

than a local criminal court where he should have been prosecuted, and has thus been deprived, without due process, of his right to youthful offender treatment. He has been denied equal protection of the law. The result would be the same even if the prosecution had not made an error. Even if the prosecution had been intentionally steered into the Supreme Court, as a matter of choice between the Supreme Court and the local criminal court, petitioner would still have been denied equal protection of the law, because others, in his identical circumstances, having committed the identical crime, would have been prosecuted in a local criminal court where they would be entitled to youthful offender treatment as a matter of right. Thus the degrees of punishment, for the same crime, would differ as between persons in the same situation and circumstances.

A statute which prescribes different degrees of punishment for the same acts, committed under the same circumstances, by persons in like situations, denies equal protection of the laws in violation of the Constitution. "Equal protection of the laws" requires that, in the administration of criminal justice, none shall be subjected, for the same offence, to any punishment greater or different from that to which others similarly situated are subjected. U. S. v. Meyers, 143 Fed. Supp. 1. The 14th Amendment to the U. S. Constitution provides that no State may "deny to any person within its jurisdiction the equal

protection of the laws."

A statute, imposing punishment for violation of a liquor law, applicable to five counties, different from the punishment, for the same violation, applicable to other counties of the State, was hald invalid in State v. Fowler, 136 S.E. 709.

A statutory scheme, respecting the treatment of youthful offenders, was held to be unconstitutional, as a denial of equal protection, because it provided that 16 and 17 year old offenders, arrested in a certain city, be tried as adults, while, if arrested outside the city, the same offenders would be treated as juveniles. Long v. Robinson, 316 F. Supp. 22, App. den. 432 F 2d 977, aff'd 436 F 2d 1116.

It is of no materiality that the prosecution may not have intentionally steered the prosecution of the petitioner away from New York City Criminal Court where he would have had the right to youthful offender treatment. The fact remains that he was not afforded that right, while others, convicted of an identical crime, under identical circumstances, in every respect, acquired that right automatically.

"Due process requires that all juveniles be treated alike, just as much as it requires that all adults be treated alike. To allow the State, regardless of the motives of its officers, to deprive (an accused juvenile) of the same rights accorded other juveniles ...is... dep-

rivation of his Constitutional rights as required under the due process clause of the 14th Amendment to the Constitution. Regardless of the well-intentioned motives of all the judicial officers involved, this Court cannot help but believe that due process must, under all circumstances, encompass the requirement that all persons, rich or poor, young or old, be accorded equal treatment." Remon v. Peyton, 268 F. Supp. 1123, 1127. Mod.o.g. 420 F. 2d 822.

"Generally speaking, the law with respect to the punishment to be inflicted for a crime must operate equally on every citizen or inhabitant of the State, and a Statute is void as a denial of the equal protection of the laws which prescribed different punishments or different degrees of punishment for the same acts committed under the same circumstances by persons in like situation." Vol. 16A C.J.S. pages 529-530, Sec. 564.

It is, of course, impossible, to evolve a statutory scheme which will insure against all differences in punishment administered. However, when statutory distinctions are made, they must be based upon reason, and must have a purpose which is apparent and logical.

"Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made. Walters v. City of

St. Louis, 347 U.S. 231, 237." Baxstrom v. Herold, 383 U.S. 107,111.

Classification of persons, for purposes of legislation, may "not be palpably arbitrary". Matter of Dorn "HH" v. Lawrence, "11", 31 N.Y. 2d 154, 158.

In re Buttonow, 23 N.Y. 2d 385, the Court followed the decision of the Supreme Court of the U.S. in Baxstrom v. Herold, 383 U.S. 107, Supra, and paraphrased the Baxstrom opinion to dispose of the issue in Buttonow. This Court might well again paraphrase the Baxstrom opinion by holding that the New York legislature, having accorded to youthful offenders the right to special treatment under CPL 720.20, and a prohibition of "a definite sentence of imprisonment with a term in excess of six months"under former CPL 720.25 (b) (ii), "may not consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold" such right and prohibition by limiting such right and prohibition to offenders convicted "in a local criminal court" under CPL 720.20 (I) (b), and thus withhold such right and prohibition from the petitioner only because he has been convicted in the Supreme Court.

"The constitutional provisions ... (14th Amendment to the U.S. Constitution, and Article 1, Sect. 11 of the New York Constitution) extend the protection to all persons ... and prohibit any state legislation which in

effect denies to any ... individual the equal protection of the laws. (See Truax v. Corrigan, 257 U.S. 312, 42 S. Ct. 124, 66 L.Ed. 254, 27 ALR 375). It has been held, and rightly so, that a provision not objectionable on its face may be adjudged unconstitutional because of its effect and operation. East Coast Lumber Terminal v. Town of Babylon, 2 Cir., 174 F 2d 106, 8 A.L.R. 2d 1219, and every state official, high or low, is bound by the Fourteenth Amendment. United States v. Raines, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 ... (a) classification is discriminatory ... (if) it distinguishes between users who ride by charter motor bus as against all others. Supreme Court rulings on the issue are contained in Truax v. Corrigan (257 U.S. 312) wherein on page 337 of 257 U.S., on page 131 of 42 S. Ct., the Court said that classification must be reasonable and this classification: 'Must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis' ... ' ...constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen and against any

stealthy encroachments thereon. ... Arbitrary selection can never be justified by calling it a 'classification". ... Therefore, equal protection of the laws is denied when all persons in the same class are not treated alike under like circumstances and conditions, both in the privilege conferred and liabilities imposed. Sacharoff v. Corsi, 294 N.Y. 305, 62 N.E. 2d 81,; People v. Ditnial, 59 Misc. 2d 264.

"Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary. C.F. Dominion Hotel, Inc., v. Arizona, 249 U.S. 265; Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412; New York Rapid Transit Corp. v. City of New York, 303 U.S. 573; Skinner v. Oklahoma ex. rel. Williamson, 316 U.S. 535". Walters v. City of St. Louis, 347 U.S. 231, 237.

" 'The Legislature may create statutory distinctions, but the power cannot be exercised arbitrarily and the distinctions must have some reasonable basis ..' Park Ave, Clinical Hosp. v. Kramer, 48 Misc. 2d 826, 829, 266 N.Y. S. 2d 147, 151, mod. 26 A.D. 2d 613, 271, N.Y.S. 2d 747, aff'd 19 N.Y. 2d 958, 281 N.Y.S. 2d 359, 228 N.E. 2d 411."

North Bellmore Teachers Ass'n v. Board of Ed. of Union Free School Dist. No. 4, 68 Misc. 2d 238.

It is clear and obvious that the distinction, attacked at bar, has no reasonable basis whatsoever. It makes absolutely no sense that a valuable right accrues to a convicted defendant in the New York City Criminal Court, and may be denied to another identical defendant in the Supreme Court for no other reason, whatsoever, than the mere difference in Courts!

"There can be no doubt that when individual rights are involved all must stand on an equal footing before the bar of justice. Furthermore, a classification which serves as a basis for unreasonable and arbitrary discrimination between persons in meting out justice violates the fourteenth amendment." Haley v. Troy, 338 F. Supp 794, 801.

The classification, at bar, creating a difference in treatment of identical persons, because of a mere difference in courts, is the basis of the unreasonable and arbitrary discrimination condemned in the Haley case, supra, and other cases herein cited.

"...in view of all the circumstances that exist, the different forms of treatment afforded violators of the section, the unnatural classification of violators and penalties to be imposed for such transgressions, ... the section violated the rights and privileges afforded persons under both the U.S. Constitution and the Constitution of New York

State." People v. Paddock, 56 Misc. 2d 123.

In a recent case, it was pointed out that CPL 720.10, subd. 2(a), part of the very statutory scheme under attack at bar, rendered an otherwise eligible defendant ineligible to be found a youthful offender merely because he had been indicted for a class A felony. The statute was declared to be violative of due process. The Court pointed out that an indictment consisted of "untested allegations" and ceased to exist" after an adjudication of the charges contained therein .....Ultimately, of course, the penalties prescribed for particular offenses must depend upon the crime of which the defendant is convicted, not the offense with which he was originally charged.

"The restriction ..... also cannot prevail against the challenge under the equal protection clause since it irrationally discriminates against those youths who had been charged with Class A felonies but who would be ultimately convicted of lesser felonies. There is, and can be, no rational basis for treating differently youths who have been convicted of the same offense merely because one of them had originally been charged with a higher grade of offense. The restriction or classification based upon the charge made in the indictment rather than the charge proven in Court is utterly capricious and irrational. It is therefore invalid under the equal protection clauses of both the state and federal constitutions." People v. Brian R., 78

Misc. 2d 616, affirmed 47 A.D. 2d 809; also see People v. Charles S., 79 Misc. 2d 1058.

It is respectfully submitted that if CPL 720.10, subd. 2(a), is unconstitutional and invalid, because it creates a "restriction or classification based upon the charge made in the indictment rather than the charge proven in Court", then, certainly, the statute, under attack at bar, must likewise be held to be unconstitutional and invalid for creating a restriction or classification based upon the Court in which the conviction is had, rather than upon the offense of which the defendant is convicted.

The objective of the Legislature in providing for the right to youthful offender treatment was to aid in the rehabilitation of young persons for the first time convicted of a crime. The provision for different treatment in different courts cannot possibly bear any relationship to this worthy social objective. The statutory scheme is, therefore, unconstitutional.

The Supreme Court of the United States has recently held:

"The Equal Protection Clause of (the 14th) Amendment does ... deny to States the power to legislate that different treatment to be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and sub-

stantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)." Reed v. Reed, 404 U.S. 71, 75-76.

The Fourteenth Amendment to the Constitution of the United States, was proposed by Congress in 1866, shortly after the end of the Civil War. Its primary, historical purpose was to remove all doubt as to the status of the newly freed negroes, and to confer upon them rights equal to those of all citizens. In re Look Tin Sing, 21 F. 905. However, the rights established are personal rights and guaranteed to all, regardless of race or color. City of Birmingham v. Monk, 185 F. 2d 859, Cert. den. 341 U.S. 940.

Petitioner has every right to rely on the provisions of the Fourteenth Amendment as a guarantee that he will be afforded equal protection of the law.

"When the law lays an unequal hand on those who have committed the same quality of offense ..., it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. Yick Wo v. Hopkins (118 U.S. 356), supra; Gaines v. Canada, 305 U.S. 337." Skinner v. Oklahoma, 316 U.S. 535,541.

Equality of protection under the law requires that, in the administration of criminal justice, no person shall be subject to any greater, or different, punishment than another in similar circumstances, People v. Gilbert, 72

Misc. 2d 795.

It is of no moment that, in adopting the statutory scheme, under attack, the Legislature was acting in good faith and without conscious attempt to discriminate between persons convicted in different courts. The essential question is whether the statute has created an unreasonable discrimination. Wales v. Gallo, 61 Misc. 2d 681.

It is respectfully submitted that unreasonable discrimination exists when two persons of identical backgrounds, convicted of having committed the identical crime, under identical circumstances, may be subject to different treatment and punishment, merely because they were prosecuted in different courts.

The People argued, in the State Courts, that the Legislature, in enacting the challenged statutory scheme, "assured that the class of eligible youths automatically to be accorded youthful treatment and six months maximum sentences would contain no one accused of any crime more serious than a misdemeanor." (Emphasis supplied). It appears that the people are charging the Legislature with having vitiated the presumption of innocence, so firmly imbedded in our public policy, in that the mere accusation of a felony is sufficient, in the eyes of the legislature, according to the People's claim, to bar the accused from receiving Youthful Offender treatment, even if the felony accusation is conceded to have been erroneous and there is

no felony conviction.

The People, in the State Courts, argued that there is a "rational basis" for the legislative classification in the statutory scheme under the attack of this appeal. The cases cited by the People, are not at all in point.

The People cited Williamson v. Lee Optical Co., 348 U.S. 483, dealing with a statute which regulated activities of opticians, exempting sellers of ready-to-wear glasses. In a later decision, the Supreme Court referred to the Williamson case as dealing with "[e]vils in the same field ... of different dimensions and proportions, requiring different remedies." The Supreme Court distinguished the Williamson case by pointing out that it had no application to cases such as the case at bar, where "the law lays an unequal hand on those who have committed intrinsically the same ....offense". McLaughlin v. Florida, 397 U.S. 184,194.

The People cited Railway Express Agency v. New York, 336 U.S. 106, which involved a regulation prohibiting advertising on vehicles, but permitting business vehicles to carry signs advertising their own business. Certainly,as in Williamson, the Court was dealing, in the Railway Express case, with matters of "different dimensions and proportions", while at bar, the involvement is with "intrinsically the same ... offense".

The People cited Dandridge v. Williams, 397 U.S. 471, in which a statute was held constitutional although it

provided for a maximum allotment of aid to welfare families regardless of family size. It was contended that small families were being favored. It was explained, in a subsequent Supreme Court opinion that the claim, of discrimination against large families in the Dandrige case, "was rejected on the basis that state economic or social legislation had long been judged by a less strict standard .... Laws touching social and economic matters can pass muster under the Equal Protection Clause though they are imperfect." U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 544.

The People cited McGinnis v. Royster, 410 U.S. 264, in which the issue was the constitutionality of a statute which denied state prisoners "good time" credit for presentence incarceration in county jails, while permitting credit for state prisoners released on bail, prior to sentence, up to the full period of ultimate incarceration. The Supreme Court found that the challenged distinction had a rational basis in that, "at state prisons a serious rehabilitive program exists. County jails, on the other hand, serve primarily as detention centers." (410 U.S. 271). Clearly, in the McGinnis case there was a difference in rehabilitative programs. There is no analagous difference at bar.

The People cited Matter of Dorn, 31 N.Y. 2d, 154, a filiation proceeding in which respondent challenged a statute excluding uncorroborated proof of access by others, whereas petitioner's proof required no corroboration. The

Court of Appeals pointed out that there was a rational basis for this inequality, holding that, "the differentiation is between, and the classification is of adversaries in litigation, distinguished by the affirmative obligation imposed upon one as against the negative posture assumed by the other".

There was, of course, a clear difference between the respective burdens of proof of the litigants in Dorn. There was no difference, whatsoever, between the procedures in the two courts involved at bar, to wit, the Supreme Court and the New York City Criminal Court.

The People, in the State Courts, argued that the challenged statutory scheme is justified by the fact that it eliminated multiple probation reports. How this factor would differ, if petitioner had been afforded the right to Youthful Offender treatment, does not at all appear, nor do the People even attempt to relate the question of the number of probation reports to the unequal protection of the law which petitioner has suffered.

In the State Courts, the People argued that the challenged statutory scheme purposed to avoid the necessity of jury trials in cases not exceedingly serious. It does not appear how this purpose could possibly have any connection with petitioner's claim of inequality of the protection of the law.

The People reiterated that the challenged statutory

scheme is reasonable because it differentiates "between accused felons and accused misdemeanants." (Emphasis supplied). In view of the presumption of innocence, petitioner submits that such a differentiation falls far short of establishing the reasonableness of the statutory scheme, and certainly has no bearing on the petitioner's claim of inequality of the protection of the law. While petitioner was, at one time an "accused felon", that accusation was conceded to have been unjustifiable, and the inequality existed only between "accused misdemeanants" in different courts, there being no other difference between the two situations as between the State Supreme Court and the New York City Criminal Court.

The People cited U.S. v. CRAVEN, 478F.2d, 1329, cert. den. 414 U.S. 866, reh. den. 414 U.S. 1086, in which case the Court upheld the constitutionality of a statute which made it a crime for anyone under indictment to receive a firearm or ammunition shipped in interstate commerce. The People argued that this case is authority for the classification at bar, creating an inequality based upon the difference between defendants accused by information and defendants improperly accused by indictment. The Craven case is no such authority. At bar, the difference between misdemeanor information accusation and felony indictment accusation disappeared, and no such difference or distinction existed at the time of sentence when defendant's constitu-

tional rights were violated, since the Court had previously accepted the misdemeanor plea upon the recorded admission of the prosecution that there never had been any evidence sufficient to justify the indictment. On the other hand, the indictment, in the Craven case, was in full force and effect at the time of the alleged violation. As a matter of fact, the Craven court, at 478 F. 2d. 1339-1340, quoted, with approval from U.S. v. Thorenson, 428 F. 2d 654, as follows:

> "[We] think it not unreasonable for Congress to conclude that there is considerable likelihood that one indicted for such an offense has a propensity to misuse firearms. In so deciding, we note that this conclusion by Congress.....is not forever conclusive upon a person so indicted. The prohibitory effect of the classification disappears as soon as the indicted person obtains dismissal of the indictment or acquittal on the charge.
>
> ".....While the provision in question does forbid indicted persons from transporting [receiving] firearms in interstate commerce while the indictment is out pending, the indictment serves only as a temporary block pending disposition of the criminal proceedings in which the indictment was filed.....we think Congress may, in pursuit of the sound objectives of the legislation, require indicted persons to tolerate this temporary limitation upon their right to transport weapons in interstate commerce. 428 F. 2d at 662.
>
> ".....[The challenged legislation] represents nothing more than a Congressional determination that one who is under indictment for crimes..... ought not to transport [receive] firearms in interstate commerce unless and until the indictment is dismissed or an acquittal is obtained.
>
> ".....428 F. 2d at 661."

The People cited Jeffery v. Malcolm, 353 F. Supp., 395, as upholding a statutory New York scheme which permitted convicted felons to accumulate larger good time credit than convicted misdemeanants. That case is not at all applicable at bar, for the Court pointed out that,

> "The different treatment afforded to felons and misdemeanants ... is primarily explained by the fact that the.....sentences imposed on misdemeanants [are] substantially shorter....Since the primary purpose of the good behavior program is to provide an incentive for prisoner cooperation with the prison authorities, id, the State may well have determined that the incentive need be greater where the sentence is longer."

In addition, it was pointed out that felons are confined in institutions, different from those in which misdemeanants are incarcerated. The different institutions provide different facilities and programs which "justify the different computations applied for good behavior time. The legislature may properly allow greater flexibility for good behavior time against longer sentences, in order to meet the rehabilitative and custodial problems inherent in a large prison system.

"Moreover, the definite sentences provided for misdemeanors reflect a legislative and judicial judgment as to the length of sentence actually to be served; the limited good behavior time allowed reflects an incentive for cooperation but also an indication that the definite terms are to be served. Where the term to be served is less definite, a greater good behavior time allowance seems

appropriate."

In their Brief in the Appellate Division, the People ended this argument by pointing out that when petitioner pleaded guilty to a misdemeanor, after having been indicted for a felony, no one, including the parties and the Court, moved to dismiss the indictment. For this reason, the People claimed that "The indictment and its continued vitality remain...." The People overlooked, completely, that petitioner's plea of guilty to a misdemeanor was accepted on their own recommendation, and on their own representation that the indictment was not justified. To contend, after sentence on the guilty plea to a misdemeanor, that the felony indictment still remained, is sheer sacrifice of substance to mere technical formality. Do the People intend to press that indictment for trial, merely because the formality of dismissal was inadvertently overlooked?

In sum, there is no argument and no case which supports the opposition of the People to petitioner's claim of the inequality of protection of the law which he has suffered as a result of the statutory scheme under review.

The Criminal Term based its decision upon the argument, urged by the People, to the effect that "The reasonable or rational basis for distinction in article 720 of the CPL lies in the nature of the original criminal accusation or charge against the eligible youth." [Emphasis in the original]. This argument has already

been answered, supra, with regard to the People's advancement of the same argument. The mere accusation of a felony is certainly not sufficient basis for a sentence of imprisonment. In adopting this argument, the Criminal Term has actually negated the presumption of innocence, and has accepted, as a basis for administering punishment, a mere concededly unfounded accusation, rather than a conviction.

The Criminal Term posed "the question: Is it unreasonable or invidiously discriminating or irrational for our Legislature to say that defendant at bar who is charged with the serious crimes of assault and attempted robbery should not have an absolute right to youthful offender treatment, but that an eligible youth who is accused of stealing apples from a street vendor shall have that right?" The obvious answer to this question is that it is, of course, "unreasonable" and "invidiously discriminating or irrational" to administer punishment based upon a mere charge of crime rather than upon a conviction; and this is especially so if, as at bar, the accusation of the more serious crime was unjustified, as conceded in the record by the prosecution, and the accused was actually convicted of the much less serious crime. To use the terminology of the Criminal Term, it is definitely unreasonable or invidiously discriminating or irrational to say that a defendant who is charged with the serious crimes of assault and at-

tempted robbery should not have the same absolute right of youthful offender treatment as a defendant who is accused of stealing apples from a street vendor, when it is conceded by the prosecution that the serious charge of assault and attempted robbery is unfounded and should not have been made, and that there should not have been any charge more serious than stealing apples from a street vendor.

The Appellate Division stated, in its decision, that permission, to the petitioner, "to plead to a misdemeanor was, in effect, an act of grace on the part of the People and the trial court." It is respectfully submitted that there was no grace, whatsoever, involved. The People conceded that there never was any crime involved more serious than "assault in the third degree at the most", a misdemeanor, and that the indictment for "attempted robbery in the second degree was not a proper disposition". The People, and the Trial Court, were thus not being gracious at all. They were reducing the charge to what it should have been originally, and saving themselves from trying a charge which could not be proved.

Appellate Division Justice Shapiro, in a concurring opinion, held "that an unproved charge may, under certain circumstances, and when considered in connection with results of the presentence investigation, be indicative of the extent and seriousness of the improper conduct of the

defendant" (89). It appears that both the Criminal Term, and the Appellate Division have completely ignored, in this case, the basic presumption of innocence. And, in this case, that presumption of innocence of the original charge ripened into a certainty of innocence when it was conceded by the People, and accepted by the Court, that the petitioner was not guilty of the original charge, and should not have been indicted. It is respectfully submitted, under these circumstances, that the unproved, discredited and withdrawn charge was not, at all, indicative of any improper conduct, and should not have been given any consideration, whatsoever, in the imposition of sentence.

Shapiro, J., in his concurring opinion, also made the observation that petitioner had received "the benefit of a reduction in the potential maximum penalty" when the charge was reduced from a felony to a misdemeanor, and that to grant him youthful offender treatment would permit him "to take double advantage" of the inability of the prosecution to carry its workload so that plea bargaining was essential. It is respectfully submitted that this observation was wholly unwarranted. The charge was reduced from a felony to misdemeanor because the People conceded that no felony had been committed, and that petitioner should not have been indicted for a felony. There was no plea bargain for the sole purpose of reducing the prosecution's workload. The plea of guilty to a misdemeanor was accepted because the

petitioner had concededly committed no crime more serious than a misdemeanor. A plea bargain is a compromise of controversy. There was no controversy at bar. There was a clear concession. Petitioner gained no advantage. He was afforded only what he should have received at the outset, a charge limited to a misdemeanor. He now prays this Court that he be afforded only the same right to youthful offender treatment which would have been afforded to him if the prosecution had not made the mistake of proceeding against him in an inappropriate forum.

In its opinion, affirming the Appellate Division Order, the New York Court of Appeals stated: "The distinction between youths charged in superior as opposed to local criminal courts is not arbitrary; it is based on the nature of the crimes over which such courts have jurisdiction." Of course, it is not arbitrary to create a distiction between youths, charged with different crimes, and to provide for the respective charges to be heard in different courts - the more serious accusations in superior courts, the less serious in inferior courts. But this reasoning is not pertinent to the petitioner's argument which is to the effect that it is arbitrary, and a deprivation of equal protection, to create a distinction between the respective punishments to be administered to identical youths, charged and convicted of the identical crime, because of a mere difference

in courts.

In its opinion, the New York Court of Appeals stated "that there is a rational basis for distinguishing between a youth accused of a felony and one charged with a misdemeanor." In making this statement, this Court gave no consideration to petitioner's contention that the felony accusation against him was the result of an error on the part of the prosecution. This contention, although indisputably supported in the record, was also overlooked in the Appellate Division. Petitioner, at pages 6-7 of his brief on the original appeal, and again at page 11, and again at page 31, and again at page 33, referred to the record of his plea of guilty to a misdemeanor at the Criminal Term. When the petitioner offered to plead guilty to a misdemeanor, the prosecutor, as stated at page 6 of the petitioner's brief on the original appeal, "recommended acceptance, stating, for the record, that it had been determined, by the prosecution, that, based upon statements of the two complaining witnesses, the charges, in the indictment, were unjustified and that, 'This is an assault in the third degree at most.' Was this not an admission, on the part of the prosecution, that petitioner should never have been accused of a felony? And should not this admission, by the prosecution, have been the subject of serious consideration by the State Courts which have passed upon the petitioner's appeals? Yet, in the long

opinions of the Appellate Division it is astounding that there was not a solitary mention of this admission, by the prosecution, of the serious error in accusing petitioner of having committed a felony. It is even more astounding that, in spite of the numerous references to this error of the prosecution in the petitioner's brief to the New York Court of Appeals, there is not a solitary reference to this error of the prosecution in its substantial opinion! The fact that petitioner has lost the right to Youthful Offender treatment because of a mere error, on the part of the prosecution, thus appears to have been completely overlooked by the State Courts. The oversight, on the part of the State Courts, is accentuated by the statement, in the Court of Appeals opinion, that "There is no invidious discrimination in a legislative decision that those individuals who, on preliminary investigation are believed to have committed felonies should not automatically be endowed with the benefit of Youthful Offender status". Is this statement intended to apply even if there is no foundation for, and actually sheer error in, the belief that a felony has been committed? In addition, in making the last quoted statement regarding "invidious discrimination", the Court overlooked the clear authority regarding invidious discrimination which was cited and quoted in petitioner's brief, as follows: "When the law lays an unequal hand on those who have committed the same quality of offense...,

it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. Yick Wo v. Hopkins (118 U.S. 356),...Gaines v. Canada, 305 U.S. 337." Skinner v. Oklahoma, 316 U.S. 535, 541.

The New York State Court of Appeals also overlooked the prosecution's error by stating, in its opinion that, "The rationality of the statutory classification is especially compelling in the instant case where defendant had been permitted to plead down to a misdemeanor. He now seeks to reap a double benefit from the congestion in the criminal courts and the crushing burden on our criminal courts and the crushing burden on our criminal justice system, by not only securing a plea to a lesser charge but also obtaining automatic youthful offender treatment. Indeed, if the trial court were aware that such consequences might flow from the acceptance of defendant's plea, it very well may not have been willing to dispense with a trial or disposition on the original felony charge." It appears, from this quotation, that the Court was clearly overlooking the record circumstances of the guilty plea. The congestion in the criminal courts had nothing to do with the acceptance of the guilty plea. Clearly, the plea was accepted because the prosecutor stated, for the record, that, based upon statements of the complaining witnesses, the indictment for a felony had no basis, and that, "This is an assault in the third degree at the most." After that

statement, how could the trial court have "not... been willing to dispense with a trial or disposition on the original felony charge"? It is respectfully submitted that the Court labored under a vital misconception of the record.

In United States v. Bland, 472F.2d1329, cert.den. 412 U.S. 909, cited by the New York Court of Appeals, the principal issue was whether defining in a statute, the term "child" as not including an individual, over 16 years of age, charged by the U.S. Attorney with certain offenses, constituted an unconstitutional legislative classification, or a negation of the presumption of innocence. The statute, 16 D.C. Code, Sec. 2301(3) (A), was enacted by Congress "To improve the operation of the juvenile justice system in the District of Columbia by removing from its jurisdiction certain individuals between the ages of 16 and 18 whom Congress concluded (1) were beyond rehabilitation in the juvenile justice system, and (2) whose presence in that system served as a negative influence on other juveniles." (472F.2d1332). Plainly, the classification in that statute had a rational basis, It was designed to protect a rehabilitative class whose presence "served as a negative influence". There is no such rational basis for the classification in the statute at bar.

The Bland issue was described, by the Bland Court, in a footnote, 472F.2d1336-1337, as involving "determination of which jurisdiction -- adult or juvenile - attaches....

in the first instance." There is no such issue at bar. The issue, at bar, is whether it is violative of due process and equal protection to confer, upon one court, the power to impose a harsher sentence than another court, upon the very same defendant, for the very same conviction of the very same crime. This distinction between the Bland case, and the case at bar, is plainly evident from the Bland Court's discussion of the effect, upon the presumption of innocence, of the prosecutor's decision determining whether an accused shall be tried as an adult or a juvenile. The Court said, "While the decision does have the effect of determining whether appellee is to be tried as an adult or a juvenile, it is not a judgment of guilt or an imposition of penalty. On the contrary, it is simply the result of a determination by the United States Attorney that there is sufficient evidence to warrant prosecution of the appellee for the offense charged and that adult prosecution is appropriate. ....As the subsequent opinion of District Judge Gesell [U.S. v. Alexander, 333F. Supp1213], ruling on this same issue under this statute, recognized:

It should be noted... that in the event of convictions the extraordinarily flexible provisions of the Federal Youth Correction Act... are completely available.

".... the United States Attorney's decision in the case at bar marks only the beginning of the process of adjudication of appellee's guilt, a process marked by the presence of all the traditional protections of procedural due

process, followed by the extraordinarily liberal rehabilitation provisions of the Federal Youth Corrections Act." (472F.2d1338).

At bar, the unfounded, erroneous decision of the prosecutor to proceed by indictment has resulted, not in "the beginning of the process of adjudication", but in the imposition of a penalty violative of petitioner's constitutional rights of due process and equal protection of the law, despite the fact that the prosecutor conceded, on the record, as has been demonstrated, supra, that the procedure, by indictment, was unwarranted!

The New York Court of Appeals also cited Jackson v. State, 311So.2d658 (cited in the Court of Appeals unrevised opinion as 311So.2d662). In that case, the Court upheld the constitutionality of a statute which contained a provision that the circuit court (apparently an adult, rather than a juvenile, court) shall have exclusive jurisdiction of the trial of a child, over 13, charged with a crime punishable by life imprisonment or death. It is respectfully submitted that this case is no authority at bar.

The New York Court of Appeals also cited Myers V. District Court For Fourth Judicial Dist., 518P2d836. In that case, the issue was whether a prosecutor may be endowed with discretion to file adult charges against juveniles who had been adjudicated delinquent for acts which would have constituted felonies if committed by adults. Not at all

there involved was the pertinent issue, at bar, involving unequal protection against the power of imposition of different penalties by different courts, upon the same defendant, and for the same conviction of the same crime.

Respectfully Submitted,

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NATHAN SCHWARTZ
Of Counsel

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

DRAYTON, :

Plaintiff, :

-against- :

THE PEOPLE OF THE STATE OF NEW YORK, :

Defendant. :

----------x

76-C-1713

United States Courthouse
Brooklyn, New York

September 24, 1976
3:00 o'clock p.m.

B e f o r e :

HONORABLE EDWARD R. NEAHER, U.S.D.J.

MAURICE DAVIS
ACTING OFFICIAL COURT REPORTER

Appearances:

MESSRS. SINGER & BLOCK,
Attorneys for Plaintiff

BY: NATHAN SCHWARTZ, ESQ.
Of Counsel

FRANKLIN L. CARROLL, III, ESQ.
Attorney for the
Attorney General of the State of New York

THE CLERK: Civil hearing, Drayton v. People of the State of New York.

MR. SCHWARTZ: For the Petitioner, your Honor.

THE COURT: You are Mr. Schwartz?

MR. SCHWARTZ: Yes. My adversary is here, Mr. Franklin Carroll from the District Attorney's staff.

THE COURT: Good afternoon, Mr. Carroll. I have read these papers, Mr. Schwartz.

However, I would be pleased to see whatever you have to say in support of the application.

MR. SCHWARTZ: I thought if your Honor would agree with those papers that would dispense with the need of my addressing the Court.

THE COURT: I wouldn't wish to deprive you of any additional persuasion.

MR. SCHWARTZ: I am very happy to hear your Honor use the word "add." I wouldn't say it's an admission. I hope your Honor has been affected by the brief. I take no credit for it.

THE COURT: I have been affected by briefs of both sides.

MR. SCHWARTZ: Well, I can compliment Mr. Walsh on his briefs. I can say they presented

some serious problems when I got them.

If your Honor please, before I embark upon the argument of this matter, I think the bench should be advised of the following act: We spoke to somebody in the Department of Corrections. I can give your Honor the name. Mr. Douglas, the Division of Correction Counseling SErvices, the Department of Correction. His telephone number, your Honor, is 374-4447.

This is important because he advised us that regardless of what happens here, regardless of anything else, Mr. Drayton, the young man here, is only 21 years old and will be out in ten days and we would like to reply after the completion of the argument, sir. We would like to apply -- if there is any discommediate decision, we would like to apply for his release on bail. The reason for doing that is that this young man is, Mr. Drayton is a rare exception, one of what I would call a brilliant demon. He has been in jail for a little over six months. Then when we initiated the proceedings to have him released, we brought a motion to set aside the sentence. We went to the Appellate Division and they gave us leave to go to the Court of Appeals. He was out on bail during all of that time and he did the

unusual and rare exceptional thing. He returned to high school, took a crash program of graduating from high school and thereafter enrolled in the State University at Westport. He completed two semesters there and during the summertime, instead of bumming around or wasting his time, he went to New York University and completed a course there. At the same time, while at New York University in the summertime, he also had a job earning somemoney for the expenses of attending college. In other words, your Honor, we feel that this is one of the rare occasions where there has been complete and total rehabilitation.

Of course, we can't bore into his mind as to whether his character has reformed. That we can't do, but where do you find a person who has been in jail under a criminal charge like this going back to school and applying himself with such devotion, and by the way, his marks for the first two semesters were 2 C's and 4 B's and an A. Although not exceptional scholarship, it does indicate sincere application.

I am presenting that to your Honor. Perhaps I am eliciting your Honor's favor, sympathies in my favor but that is my obligation.

THE COURT: I understand that. I think,

however, I was about to say the jurisdiction of this Court would depend upon your persuading me that there is substantial merit to the legal position advanced.

MR. SCHWARTZ: Of course, I am faced with a difficult task. Your Honor realizes that. There is an opinion, lengthy opinion in the Court of Appeals holding that the statute is constitutional and who am I to buck the Court of Appeals and convince your Honor that the seven judges there are wrong, but there were times when I felt that the Court of Appeals was wrong and even though we never resolved the conflict I still stuck to my own thinking.

Now, if your Honor pleases, you will find that we have cited some law in the petition and then presented, on top of that, a voluminous brief. Your Honor will forgive us but under the pressure and tension, we couldn't do a total and complete job.

I assume your Honor knows what the issue is but please let me redefine it.

This defendant, Arthur Drayton, and he was under 17 when the event upon which he was brought into the toils of law occurred, he was under 17, was indicted for assault third degree.

Is that correct, Mr. Carroll? Indicted second degree? He wouldn't have been indicted if there

had been only an information for assault third. It's third. Second degree.

MR. CARROLL: And attempted robbery second degree.

MR. SCHWARTZ: Thank you.

That document, the indictment, meant that he would have to go through the criminal courts, through the channels up into the Supreme Court. In the Supreme Court, he pleaded guilty to assault, third degree.

Now the statute creates a rather peculiar distinction and we feel here and we felt all along and it was seriously considered by the Appellate Division and the Court of Appeals. They must have felt there was weighty merit to our contention that the distinction I am to bring before your Honor was unconstitutional. Judge Shapiro gave us leave to appeal and the Appellate Division considered it for quite some time. A lengthy opinion was held over there and then we got permission to go to the Court of Appeals and the Judge handed down a lengthy opinion. They felt there was merit and valid and basic argument to our contention that the statute is unconstitutional, in that it defines the equal rights provisions of the --

THE COURT: Equal protection; is that what you are trying to say?

MR. SCHWARTZ: Well, forgive me, your Honor. I am not that familiar with the Constitution. In this case I would say these two words are synonymous. What we are dealing with are rights and what all the other courts, the Supreme Court proceedings, they include the word "rights." Although I may be misquoting the Constitution, the thought is there has been a denial of equal rights. The appropriate sections, and we have cited the numbers, the sections in our brief, provides that where the defendant pleads guilty in a criminal court and there it must be only to a misdemeanor, they wouldn't have the authority to accept a plea in a felony. Where he pleads guilty to a misdemeanor, the hands of the criminal judge are tied. He is limited with respect to the punishment and sentence that he can inflict upon the defendant.

First of all, the statute says that where he is under 19, where the defendant is between 16 and 19, Youthful Offender treatment is mandatory. He has no choice in the matter. It doesn't make any difference what he thinks of the character of the defendant. It doesn't make any difference that he may even believe that this defendant will never be a

useful member of society and will spend the rest of his life as a criminal. He has no authority to impose a sentence to exceed six months and must accord the defendant Youthful Offender treatment. The same section, or a section within that article provides that where the defendant starts the course of criminal attack in the criminal courts, through an indictment, that therefore the defendant must appear or have his punishment or whatever it is decided in the Supreme Court, the Judge there has the discretionary power to deny the defendant the Youthful Offender treatment, even though he knows, finds that he is eligible for Youthful Offender treatment and there is no limitation. The same limitation that is imposed on a criminal judge, that he is not subject to that limitation and in this case, although the defendant was indicted for assault second degree, he pleaded guilty to assault third degree. The sentencing judge, the judge before whom the matter came, found the defendant was eligible for Youthful Offender treatment but denied him that on account of a previous record before, apparently before he was 16 and also gave him the limit, on the plea, of one year.

Now, it is our contention, we have a twofold

contention here. First of all, that is unequal treatment, unequal protection of the law. We claim, and one of our cases says so, not in so many words, that where the facts of the proceeding are identical, it's a violation of the equal protection provisions of the United States Constitution and the New York State Constitution for the court imposing the sentence to have different powers, one to have a greater power and the other one to have his hands tied and limited. Why should defendants appearing in court, under the same identical facts, a conviction of assault third, why is it that in the criminal court he can't get more than six months; he can't get --

THE COURT: May I interrupt?

MR. SCHWARTZ: May I ask your Honor one favor?

THE COURT: Yes.

MR. SCHWARTZ: Please, never hesitate to interrupt me or else how can I find out what is in your Honor's mind?

THE COURT: You made the statement, though, that where the facts are the same. Now, that isn't quite true, as I understand from your papers and what you have stated so far. If I understood or remember correctly, what I read, a Youthful Offender who is initially accused of a misdemeanor offense is

so accused because the underlying facts of the charge are what to be believed to be the basis of the charge are less serious. However, where a young man who would, or boy, if you would call him that, is accused initially under an indictment, am I correct in believing that in the State system, indictments are only employed where felonies are involved; is that correct?

MR. SCHWARTZ: Yes, your Honor.

THE COURT: We don't indict someone --

MR. SCHWARTZ: I agree with your Honor.

THE COURT: In other words, they don't indict for a misdemeanor.

MR. SCHWARTZ: I agree with that fully.

THE COURT: Now, it's commonly accepted that the facts involved in a felony-type situation are more serious.

MR. SCHWARTZ: I concede that.

THE COURT: So, when you say there is an inequality here, are you being strictly accurate?

MR. SCHWARTZ: I believe I am, sir.

THE COURT: Why? I am talking now about the original beginning of the prosecution.

MR. SCHWARTZ: I go along with your Honor's

arguments and I understand what your Honor is trying to tell me and that was the point to which the decision of the Court of Appeals is based, that these are two different situations, but if your Honor pleases, of course, I may have nerve disagreeing with the Court of Appeals and I respect them, but I feel that they are wrong for this reason.

THE COURT: One thing I think you should bear in mind: I don't believe the Federal Court, in the exercise of its habeas jurisdiction, is supposed to sit in correction of errors of the New York Court of Appeals in interpreting the law of New York or applying it. Our function, as I understand it, is simply and solely to determine whether the law, in and of itself, or as interpreted, violates equal protection by not having some rational purpose when it differentiates through the application of the law from the situation of somebody else. You see?

MR. SCHWARTZ: Your Honor, I follow your Honor completely and the Court of Appeals said that there is a rational differentiation between the two situations. Now, I feel --

THE COURT: Growing out of the manner in which the accusation originates.

MR. SCHWARTZ: I've considered that and my

argument, one of my arguments, I will address myself to that matter right now.

It is my feeling, and with pride I can say, that when I feel some way or something about the law, having practiced for quite a good many years, I am ashamed to tell your Honor how long --

THE COURT: You shouldn't be ashamed of that.

MR. SCHWARTZ: Even though I may disagree with the bench and Court of Appeals, I am conceited enough and have pride in my thinking ability that there may be some basis for my thinking, even though the Court of Appeals disagrees with the Appellate Division. It is my conception of the law that a pleading, whether it's in a civil matter or in a criminal matter, a pleading is not proof of the facts and a pleading, although it directs the path of the Court into which the controversy is to go through, shouldn't be permitted, cannot be the basis for the imposition of a serious punishment. The punishment can come only after conviction and can be predicated only on what the conviction was for.

In other words, once a judgment of conviction occurred and sustained by the defendant, then the pleading and indictment are all merged in that

judgment and consistent with the procedural evidence rule. I think the same thing applies to judgments. Everything that occurred before that becomes null and void and cannot be made the basis for the infliction of serious punishment.

Now, this defendant pleaded guilty and there is a conviction but the conviction is assault third degree. The punishment should be dictated, the punishment should be dictated by the conviction and not what the indictment said. After all, the indictment is no proof of the facts that occurred. It is no proof of the crime that was committed, and in this case, this is an argument specially applicable because in open court, when the plea was taken, your Honor, the prosecuting attorney made a statement --

THE COURT: I am familiar with it. It shouldn't have been a felony case. At most, it was a misdemeanor.

MR. SCHWARTZ: It shouldn't have been a felony case and I think we have a right to rely on that statement but whether the prosecuting attorney was right or wrong, there is a possibility -- well, we say a probability -- let's assume there was only a possibility that that was correct. The differentiation there strikes down the rights that we would have

had under that possibility, if there was only a possibility that it was no more than a misdemeanor. The Court of Appeals or the judicial system of the State of New York had no right to deprive us of the benefits of even that possibility, but looking at it from the broad point of view, your Honor, the Court of Appeals said that we have to look to the indictment to see whether the Court should have that power. I don't think it's fair to look at the indictment. I feel that the facts contained in the indictment mean absolutely nothing at all. It's the indictment -- it is merely a document which indicates the procedure that is to be followed and to predicate a severe punishment, and this was a severe punishment to deny this defendant YO treatment merely on facts that are not proven, you are hurting highly, very, very improperly, he is injured, damaged very, very severely.

THE COURT: You would say that the only facts proven are those admitted by his plea to assault in the third degree? That's whatyou would say?

MR. SCHWARTZ: Not only that those are the facts that are proven, I go further. I contend that the indictment lost all effect as soon as the plea was accepted. The judgment of his conviction, as I

stated before, merges all previous proceedings.

THE COURT: The only thing is, I know what you are saying and it's certainly logical and I don't suggest I am disagreeing with it, but we do know, when you get down to dealing with the realities that the law generally attempts to deal with, that there are situations where the indictment does indeed rest upon acts which are felonious but nevertheless, for whatever reason, the District Attorney is willing to agree with the defense counsel to accept a plea to a lesser grade of offense, and indeed, perhaps reducing it down to a misdemeanor and that, you know, frequently happens. Not frequently happens.

I realize that what complicates this thing is the youthfulness of this defendant and the Youthful Offender status question which is raised, but the law cannot take account of every exceptional circumstance. Right? It has to deal with the generalized realities of the situations and not inhibit the right, let us say, of both the prosecutor to reduce, in order to accomplish, first of all, saving the time of the prosecutor and of the Court in trying a case where the defendant says I am willing to plead guilty, provided you give me a misdemeanor or you agree, for instance, that he won't get more than the maximum on

the misdemeanor and something to that effect and the prosecutor says, yes.

Now, forgetting for a moment the age of this defendant, you could hardly say that this was an irrational permission of the law to allow that to happen. Yet, if the acts were considered, the circumstances serious, if the defendant got the maximum for the assault, he could hardly complain because he had the prosecutor say, "No, I will not give you the plea. I will try this as a felony case." There is a possibility that the man will be convicted.

MR. SCHWARTZ: I have two answers for that: I believe I am correct in stating that the record does not indicate any affirmative plea bargaining. I have read the record. I wouldn't say that I studied it. I told your Honor I did not write the brief so I didn't study it but the record does not indicate that there was any act of plea bargaining and I don't think that the Court of Appeals had the right to assume or presume, whichever word is applicable, that there was such a thing of plea bargaining. I think that my statement that the plea benefited the State of New York is not inconsistent with the record.

THE COURT: I'm looking at the record.

MR. SCHWARTZ: 63(d) of the record.

THE COURT: Yes, I know what you are referring to. When you say there was no plea bargaining, I'll accept how you characterize it but it was the defense application to withdraw a plea of not guilty and plead to assault in the third degree. Ordinarily, the defendant cannot control the acceptance of the prosecutor -- I mean the prosecutor has to agree that he will accept such an offer. Isn't that the bargain?

That is to say, the bargain is, in order words, either for dismissal of the indictment or full satisfaction of the indictment or what have you. The plea of assault in the third degree will be accepted and that is the bargain, as I understand it.

MR. SCHWARTZ: The statement I am about to make is not inconsistent with the record. The prosecutor may have come to this defendant and said, "Hey, I've gone through the Grand Jury minutes and he did say he spoke to two complaining witnesses the day before the matter came up on the calendar and I find that it's no misdemeanor."

THE COURT: No felony.

MR. SCHWARTZ: "It's only a misdemeanor. It's not a felony." There is that possibility and I feel that where such serious rights are involved, I don't think the honorable Court of Appeals -- and of course

I respect them immensely, I don't think they had the right, even judicially or as a matter of decency, to assume that there was plea bargaining here. There is nothing in the record here to indicate that there was affirmative plea bargaining, give and take a situation, between the prosecutor's office and this defendant.

Now, if your Honor please, you will notice I am not denying that there was such. All I'm saying is there is nothing in the record to indicate it and I think I have a right to invoke the rule: What's not in the record shouldn't be assumed or presumed.

Now, may I -- if your Honor will bear with me for one moment?

(Pause.)

I stated before your Honor that the indictment shouldn't be considered or should not be involved in the issue as to -- the issue that we are presenting here. Now, to show the basis for my feeling that the indictment should be ignored, I read from page 5 of the opinion of Judge Gabrelli (phonetic), and where he raised the point that your Honor raised previously, that there is no invidious discrimination involved in the legislative decision that those individuals who on preliminary investigation are believed -- since when did your Honor we predicate such a question as

to the length of time of imprisonment should be predicated on mere belief? The word believed is used by Judge Gabrelli. Will your Honor impose a more serious -- impose any sentence on a person just because your Honor believed something? I am attacking, your Honor, the argument of the Court of Appeals, and I am using their language. That word "belief" squarely shows, in my humble opinion, that there is a necessary basis here for telling this defendant here that he can't get YO treatment and must serve a full year in jail, but on this question of the difference of treatment by the statute, suppose your Honor, instead of being highly technical and using those words about discrimination and the proper qualification and all of that, takes this defendant as an individual, and I think that is as a matter of law, I have a right to ask you, your Honor, to consider it from this point of view.

(continued next page)

What does it look like to the layman who says here is this person who pleaded guilty to a criminal court for the same crime that the other one pleaded in the Supreme Court but this one you can deny Y.O. treatment and you can give him a full year in jail, but this one the law says that this Judge can't give you more than a half year and give you Y.O. treatment? On the simple basis like that, is that fair? I think the language used by the Court of Appeals, and other cases that are there, as long as the differentiation is arbitrary, you can have two different treatments.

Your Honor, that is not equal protection of the law. That is not giving both parties the same and equal treatment and may I just make this statement: additional statement?

We are talking about equal protection of the law. It seems to me that it can be invoked, not as a matter of constitutional right. Justice means -- carries with that word, equal protection of the law. When you are giving two different people, under the same identical circumstances, and the circumstances are identical if they plead guilty to the same crime, regardless of the fact that one is only by information in the Criminal Court and the other one in indictment

of the Grand Jury, when you are not giving them equal protection, the same punishment or the same relief, that does not constitute justice, regardless of whether the United States Constitution imposes that obligation on the bench.

THE COURT: I understand your emotions in the matter. All I'm trying to say to you is that the Supreme Court of the United States has itself laid down guidelines which the lower courts, such as myself, must in good conscience attempt to follow. We cannot ignore what the Supreme Court has had to say, assuming that what they have had to say applies to this situation here.

Now, one of those guidelines is that Federal judges do not lightly overturn the statutes of the State, of a State, on constitutional grounds, unless you can say, or you can find, that there was no rational basis for the legislature to have made such a distinction. Do you understand? I am a court of limited jurisdiction and your argument does seem to say that it is irrational. That's what you are really saying. You are talking about not getting equal protection but you seem to be saying that there is something irrational about saying that in one court, if you are charged with a misdemeanor, indeed if you

are found guilty of it, I take it in the local criminal court, you don't have to plead guilty. You can stand trial without a jury and if you are found guilty, the maximum is six months. You don't even have to show evidence of contrition or rehabilitation by offering a plea. Six months is all you get and then you say by the mere happenstance of being in the Supreme Court, and you show contrition and an effort of rehabilitation by offering to plead guilty, acknowledging your crime, you can get up to a year. I know what your argument is.

MR. SCHWARTZ: I know the United States Supreme Court has used the term "irrational differentiation." We have to go the meaning of the word "rational" and it is my feeling, perhaps it's my belief, that the word "rational" cannot include a situation where there is inequality.

THE COURT: That isn't so.

MR. SCHWARTZ: I haven't researched that point and haven't gone through it.

THE COURT: There are many cases where it had decided that one. The state said we will give two hundred and fifty dollars a month for the support of poor families and we don't care whether they have two children or ten children to feed. Two hundred and

fifty dollars is the amount and it was tacked on it on the ground that it is ridiculous; it is unequal. You can't feed ten children with the same amount of money as two children. I have to say it's logical. The Supreme Court said each family got the same amount of money; two hundred and fifty dollars. The state has limited resources. We cannot say it is rational where the state has to distribute what it has, to say that each family should get the same, even though the effect is to leave a family with ten children less well off than one with two children.

So, the mere fact that being treated unequal doesn't mean being deprived of equal protection under the law so as to invoke a constitutional prohibition. I cite that as an example of one case.

MR. SCHWARTZ: I realize that, your Honor, but the thought occurs to me, I hope your Honor will agree with me, that the definition of the word "rational" should be different in civil cases than in criminal cases, because in the criminal case far much more is involved. This young man's future in involved on his losing the conviction against him. His whole future is involved in this, to be able to throw off this conviction and if he gets Y.O. treatment, he walks into society, after his graduation from college

and there is no doubt about it that he will be a member equal to society, without the ball and chain of a criminal conviction, so that I am asking your Honor that even though the United States Supreme Court used that language in a civil case, please, I feel that there should be made a distinction made between a criminal case and a civil case, that the word "rational" should be interpreted in favor of this defendant, only because it's a criminal situation.

THE COURT: Let me ask you this: There are others who appeared in the Supreme Court, let us say, and pled to misdemeanors and they can get up to a year, the only difference, let us say, they are found not eligible. You are saying that because your particular client happened to be eligible, he ought to be treated the same way as eligibles in the lower court or the local court are treated; is that what your argument is?

MR. SCHWARTZ: My argument, your Honor, is that the treatment, the sentence, the punishment, must be predicated exclusively and only on the judgment of conviction and nothing else and whatever preceded that, I feel has been totally and completely merged in the conviction, just as we have the procedural evidence rule, I feel the same type of thinking is

applicable to judgments, to all judgments. You can't go behind the judgment, even in a civil judgment. You have the decision there. You have the judgment. You can't go behind a judgment to determine what is what.

THE COURT: I understand your argument.

MR. SCHWARTZ: That is what makes --

THE COURT: If you put it in more simple terms, why should a young man, eligible to be a youthful offender, be worse off in the Supreme Court than he is in the local criminal court.

MR. SCHWARTZ: Now, another phase of that, your Honor, is, and frankly, we couldn't find any law on this, and it's another phase of this and I argued --

THE COURT: The trouble is you are always raising cases that we can't find any law on.

MR. SCHWARTZ: We know that there are different layers of jurisdiction in the same court system. The Supreme Court has the greater jurisdiction than the criminal.

THE COURT: I'm well aware of that.

MR. SCHWARTZ: Now, that superiority consists only in the areas in which the Supreme Court, the higher court, can function. For instance, the higher court can handle equity cases. The lower court can't. But where you have a situation where the facts are

identical in the two courts, as here, the facts are identical in the Supreme Court and in the lower criminal court.

In a conviction of a misdemeanor why should one judge or one bench have greater powers than the other one? Is there any difference in the training between the two members of the bench?

THE COURT: I don't think you're going to get anywhere with that argument because the facts of life are that the Supreme Court justices are chosen on a different basis than inferior court judges; that they do have different jurisdiction. No question about that.

I think what really the best thing you can say is: Why should a defendant found guilty of a particular offense be treated any differently for that offense because it happens to be in the Supreme Court, then in the local criminal court? There is logic to what you say with that. I have to agree with that. What rational basis is there for that differentiation?

If I can be persuaded that no rational basis is shown, then you win, but if I am persuaded that there is a rational basis for that distinction, then you lose.

MR. SCHWARTZ: The only basis for that distinctio

which I do not consider rational, is the only difference is that in one, there is an indictment by a Grand Jury and the one there is not. I am stating again, your Honor, that I feel that the bench must ignore the fact that in this case, in the Supreme Court, the matter starts with an indictment from the Grand Jury. I feel that -- may I finish? I feel that the Court's attention, the telescope or microscope the Court will be looking through, should cover only the conviction and nothing else. I feel that the Court has no right to, as a matter of judicial philosophy, to give any consideration or lend any weight to what had preceded the conviction. That is my argument on that basis, simply.

Now, may I continue a little further?

THE COURT: Let me ask you this: What more do you have to urge? I think we fairly well explored the innards of this legal situation and I would like to hear Mr. Carroll.

MR. SCHWARTZ: I am inflicted with a very poor memory. I make myself a little outline.

THE COURT: Would you look through it and see if there is anything we haven't touched on that would enlightening?

MR. SCHWARTZ: The last that I would like to

leave with the bench is: I think I have covered most of the things. The last thought I would like to leave with the bench is, even if there is a rational basis for it, we have to show, the people have to show that there would be some benefit to society, or to the people. by insisting on a strict interpretation of the law.

THE COURT: Oh, no. I don't think I could accept that. As I said to you awhile ago, a Federal court is not set up to oversee the state courts and to correct errors they may make, unless they are errors of constitutional dimension. That is my point. This Court has a very limited jurisdiction. The Federal Court, as the Federal system, has its own criminal jurisdiction. It does attempt to tell the states how they manage their courts and criminal jurisdiction, only when the United States Constitution comes into play and something is done which the Constitution does not permit to be done, and then may a Federal court attempt to do something about it.

MR. SCHWARTZ: I concede all of that and I recognize the fact that there should be a limited jurisdiction in this Court to override the decisions of the other courts, especially in view of the -- well, almost the doctrine of res judicata, almost

applicable here. However, our objection to the decision of the Court of Appeals is of Constitutional dimensions. Whether there is or isn't a rational basis, there definitely and squarely is inequality of treatment. We can't get away from that and the mere fact that certain language was used by the United States Supreme Court, cannot contradict the fact that the defendants who are in exactly the same position, one in the Supreme Court, and the other in the lower court, who are in the exact same position of having pleaded guilty to the same identical crime, those two defendants are not getting equal treatment. That is a matter of serious constitutional dimension and I feel that we have absolutely every right to ask your Honor to decide that --

THE COURT: You have the right to ask me.

MR. SCHWARTZ: That's all I said. We have the right to ask your Honor to rule that there is definitely an inequality and what my adversary will do --

THE COURT: Why don't I let him do it. Don't assume anything.

MR. SCHWARTZ: He has to juggle words of the United States Supreme Court and I am asking your Honor, this is not a matter, nor is it fair, to juggle words or a matter of semantics. There is inequality and this

boy must have the benefit of the decision, releasing him for his own future. Thank you, your Honor.

THE COURT: I understand what you are saying.

MR. SCHWARTZ: I may ask for time to reply to my adversary. On the other hand, I may not.

THE COURT: All right, Mr. Carroll. Good afternoon.

MR. CARROLL: Good afternoon, your Honor.

Judge, I have very little to add to what has been submitted to this Court in brief. Mr. Schwartz' remarks, I thought, were quite passionate; rather eloquent. It seemed they addressed two questions, neither of which is precisely before this Court. One of propriety of the sentence, originally, which was a matter which was discussed in this record before Judge Cudah, when it was passed and, secondly, as matter of legislative policy, the wisdom of the New York State Legislature enacting this series of statutes, which inter-relate in the way it is outlined in my brief and in the committee reports to the legislature which I cited. However, this Court does not sit as you are so aware, to judge the legislative wisdom of the New York State Legislature or any other. The question is whether the legislation is so irrational, so contrary to logic and reason, that it violates

the equal protection clause, due process clause of the United States Constitution. It has no rational basis at all and I submit that the record is clear that this legislation is based on reason and on fact, both the point made in the brief about the context of the indictment, the fact that the legislature may conclude that the ultimate disposition, ultimately reached, made, may not be in the context of the plea bargaining show the underlying cause of the intent and the legislature might use that as a basis for justifying a distinction in treatment at sentencing when the more serious charges involved and that's what we have here. This defendant was indicted for a class D felony, carrying seven years.

THE COURT: One thing I would like to add, since you pointed out this argument in this direction, isn't it a fact that at some point, which I believe would be applicable here, the legislature, in New York, in effect, deferred the finding of youthful offenders' eligibility from the pre-pleading to the post conviction stage?

MR. CARROLL: Yes.

THE COURT: And what statute is that? What is the reference to that?

I have your briefs but I would like to have you

tell me what you consider that amendment to be.

MR. CARROLL: I believe that the reasons for it are discussed in the passages in the legislative history cited. These statutes were all enacted as part of the package that went through in one bill.

THE COURT: Let me say I understand some of it. I remember some of it. For example, the Baldwin case in the Supreme Court which created a problem in that it said that anyone who was going to be charged, even with a misdemeanor in which sentence greater than six months be imposed is entitled to a jury trial. In the superior courts, jury trials are unheard of with misdemeanors so, rather than deal, to cope with that situation, a whole new pattern of misdemeanor procedure was worked out; correct?

MR. CARROLL: Yes.

THE COURT: Which also entailed the treatment of young people who would be entitled to youthful offenders' treatment. You are referring to that?

MR. CARROLL: Yes, and the statute that changed the time for the decision on the granting of youthful offender treatment is this statute 7201A and there is a corresponding provision that provides that on the request of an eligible youth after the indictment is filed in the superior court, the instrument will be

sealed.

THE COURT: Yes. Now, the fact remains, aside from that, the legislation, or at least the philosophy of the youthful offender treatment is -- was to insure that no young person, who would commit let us say his first offense, would thereby be stigmatized for life with a criminal record and would get the benefit automatically as I understand it in the criminal courts, of youthful offender status which would mean his status of a youthful offender that he get, at most, a sentence of no longer than six months, the criminal record would be sealed so he has no record. Only if he did it again would he run afoul of the law, in effect, and I suppose under those circumstances, he would be denied a youthful offender treatment in the lower court and still get six months again for whatever he did the second time.

MR. CARROLL: The second time around would be for a year.

THE COURT: The misdemeanor charge is up to a year. He can get a year the second time around and get a criminal record for a year. If there is any significance at all though, aside from these to some extent housekeeping purposes, if there is any purpose at all to the youthful offender treatment, why should

it be denied to a young man who happens to fall into the Supreme Court, under an indictment, but after the pleading stage, the crime defined to also a misdemeanor and the determination of his status, post conviction, is not mandated. Otherwise he is eligible. Not mandated but left to the discretion of a judge who thinks he ought to get a year. I am not persuaded of the rationality of that in the whole scheme.

MR. CARROLL: Well, I wonder if the Court is using rational and wisdom interchangeably.

THE COURT: I am talking about the logic of it. Why should the mere fact -- I understand how he gets into the Supreme Court. I assure you I have that in mind but since it seems to me the youthful offender program is applicable to both courts, why should it be a different program in the Supreme Court than in the local court?

MR. CARROLL: Well, I think it would be indeed is painfully clear in a situation where the discrepancy and the seriousness of the crime is greater, if the defendant were, for example, guilty of murder. Isn't that a matter which ought to be considered?

THE COURT: That wouldn't be Y.O. in any event, would it?

MR. CARROLL: Let's make it manslaughter.

THE COURT: Let's make it manslaughter. Is charged with manslaughter, but I'm not talking about -- my feeling is that you can't equate manslaughter with assault in the third degree because manslaughter would not be a misdemeanor charge, in any event. It would be a felony charge. I think we have to equate the equal offenses. I don't know what other offense, but it seems to me, whatever you call it class A or D --

MR. CARROLL: The class A misdemeanor.

THE COURT: It's the one that get up to a year and still can be the same thing on the lower criminal court; is that also so?

MR. CARROLL: Yes; yes.

THE COURT: Even though you are brought into the Supreme Court, under an indictment of a Grand Jury, unless the District Attorney decides to go ahead and try to convict you of a felony, but instead of that is willing to accept a plea to a charge of a misdemeanor isn't that the crime for which the person stands convicted? He stands convicted of a misdemeanor, just as if he would have been in the other court and why is he treated differently, if he happens to be a youth, simply because he's in the Supreme Court? I have some difficulty understanding the logic of that: Not the wisdom of it, the logic of it.

MR. CARROLL: I will concede that if you assign certain rehabilitative value to the youthful offender statute and series of statutes, it is a complicated coster of statutes, it must, in every manifestation, carry out its central purpose, without granting the legislature the opportunity or the right or the power to consider alternative values, alternative needs of system practical needs, alternative needs of society. Then, indeed, the argument just advanced by this Court is valuable both in logic and law. I submit that the law and the Federal law does not impose so tight a straight-jacket on legislatures of the state or of the Federal Government, that the needs of practicality involved, that underly all these revisions --

THE COURT: I know the arguments, I assure you. All I am trying to say is, however, that I do believe that there comes a point where what may seem to be rational on a practical basis, becomes irrational when you contemplate the overall purpose of the program and that's what I am trying to cope with here. Why should the youthful offender program be applied any differently in the Supreme Court than in the local criminal court, when its essential purpose is to give, to restore or help a first time youthful offender? I recognize in this case the Court dwelled upon prior

juvenile brushes with the law but it was my understanding that those don't count.

MR. CARROLL: They counted in the probation report.

THE COURT: When you say they counted in the probation report, they came up in the probation report?

MR. CARROLL: Yes.

THE COURT: And in the local criminal court no probation report is ever prepared.

MR. CARROLL: There is no option to sentencing. There is no need for it.

THE COURT: So far as juvenile offenses, I am concerned with, that is not tantamount to a prior Y.O. conviction, so the statute is clear that you're eligible unless you have a prior Y.O. conviction. How about a juvenile offense? It says, first of all, juvenile delinquency is regarded generally as not a crime. That's why it's referred to as delinquency. It is unquestionably not good for a young man to have that come up, but the point is that we look at this naked statutory language. Unless you have been previously given the benefit of youthful offender treatment, not juvenile, you are eligible, if all you've done -- you're eligible for a mandatory six month sentence.

MR. CARROLL: I think this raises a few points. It has never been contested that Mr. Drayton is not an eligible youth. I believe probation reports are prepared in the criminal court as well. The charge need not impose a sentence at all. In either event, it is my understanding that the probation report involves an analysis into the defendant's character, background, association, reputation. Indeed they involve accounting, taking into account the things that otherwise are never mentioned in a court of law. That seems to have been the case in this one. I've never read it. They were sealed in those days and those reports have never been changed. There have been some indications in the record of what it must have included. Whatever was in this probation report, plus what else Judge Cudah saw of the defendant and the defendant's family, made some determination about the sentence. The legislature said of that determination that was one the judge could make and that is the only question we have here; whether it violated the Federal Constitution or the legislature to have given that power to the judge under those circumstances

THE COURT: It depends on the rationality and its rationality grows out of what?

MR. CARROLL: It grows out, I submit, first,

the congestion in the courts, the plea bargaining and congestion.

THE COURT: Now, you are talking about the economics of administration. The Federal Court has felt that that is not a good reason for discrimination.

In fact, Judge Heller just the other day invalidated a state statute involving payments to elderly people, citing that the case that I refer to, which emanated from Massachusetts, to the effect that mere convenience, economic justifications, are not sufficient to deny equal protection.

MR. CARROLL: Well, Judge -- put it this way: The assertion is unassailable.

THE COURT: I know. You have a reputation.

MR. CARROLL: The point is that some administrative economic considerations are more compelling than others. Some that are involved are more reasonable than others. I submit, however, that the question is not how reasonable. The question is not how permissible the reason.

THE COURT: I don't wish to interrupt you because I know you have done a very good job in your brief, very enlightening. What I am trying to say is, I can't see any justification, for saying that a Supreme Court judge is bound by the same Y.O. program

as the local judge. It doesn't cost the state any more money. I don't see any economic loss with it for the state, with dealing with youthful offenders, provided they are eligible. If they are eligible in the district court and eligible in the Supreme Court, why aren't they treated the same way? That doesn't involve, as I see it, involve any economic imposition on the state's treasury, any confusion or anything else.

MR. CARROLL: That's a legislative argument.

THE COURT: You say I am attacking the wisdom of the legislature for not having this clairvoyance that I profess?

MR. CARROLL: I think that we can accept the fact that a convicted B felony may not be inevitably deserving of a youthful offender treatment as one who is convicted of an A misdemeanor.

THE COURT: The difference between a convicted felon and one convicted of a misdemeanor is a big difference. That, I couldn't agree with more. There is just no comparisons. They are not equal.

MR. CARROLL: When a conviction is the same --

THE COURT: All I am saying is, Jones in the local court pleads guilty to assault in the third degree, eligible for Y.O. of six months, his record

is sealed. Drayton in the Supreme Court pleads guilty to assault in the third degree. The judge says, "No Y.O. A year in jail." Why the difference?

You say, "Well, the judge had the opportunity to see his report." Now would it not be a fact that if Drayton had been in the criminal court, you said they do use probation reports. They would have seen that too, but the judge would have been bound by the six months; would he not?

MR. CARROLL: Yes.

THE COURT: I find it hard to follow the reason for the disparity.

MR. CARROLL: Were it easy, none of us would be here.

THE COURT: There would be no case.

MR. CARROLL: I think, in addition to the plea bargaining argument, the fact which is something more than administrative argument, I believe, in the context of the bargaining, the legislature was entitled to conclude, and I think this is a point made in brief, that the ultimate disposition may not always accurately reflect the underlying social harm that involves a certain contrast, I submit, to the situation; the contrast drawn by the other sub-section of that sub-section.

Accused misdemeanants, none of whom, by hypothesis, none of whom could have inflicted any more social harm than that involved in these relatively less serious cases. Secondly, there is, in this scheme, the granting of a certain quid pro quo in return for being in the class that's automatically entitled to youthful offender treatment and the six month maximum sentence. Namely, that that group is under correlative difficulties and Drayton and those in his class didn't face, the availability of a jury trial. Those in that class, automatically entitled to the youthful offender treatment, they can't have a jury of their peers. They can't have a jury of citizens. They must go before a judge. It isthat right that some think is of some importance. And these, in one administrative light, that is one of the purposes of the classification that Drayton was left out of it, the creation of this speedy system for prosecuting Y.O. cases.

It seems to me that that administrative reason is compelling, perhaps not on all grounds of administrative agreements, inflicts any hardship on any citizen, but this one is and that ground on administrative convenience did justify the creation of the classes defined in 7201B I think.

THE COURT: Let me ask you this: Suppose, maybe

this isn't a possibility, that Drayton had been indicted, as he was, and the District Attorney came to the conclusion that he couldn't prove the felony case and there was no suggestion that Drayton wanted to plead? Now, in the state, you have lesser included charges; correct?

MR. CARROLL: Yes.

THE COURT: Suppose as a result of his trial he was convicted by the jury of a misdemeanor of assault in the third degree? Now, is it your position that because he had a jury trial on that, that he should -- that the judge could then still go ahead and that the judge did not have to give him Y.O. treatment, though he was eligible for it? He had a jury trial and was found guilty only of the lesser included charge. That's all he was convicted of. I assume that's possible.

MR. CARROLL: Yes.

THE COURT: You would say that because he had a jury trial in those circumstances, he should be denied youthful offender treatment?

MR. CARROLL: Oh, no. I believe --

THE COURT: Well, your argument seems to be, brought right to a jury trial, exist in the higher court and not in the lower court, that that is somehow

a compensating feature for denying youthful offender treatment.

MR. CARROLL: Well, Judge, the statute at issue, the statute under which Drayton was sentenced doesn't preclude a possibility of youthful offender treatment. It only makes it discretionary with the trial court judge before whom the conviction was had, by either plea or verdict and who has the responsibility for sentencing.

Now, firstly, in no way do I assert now or have I ever attempted to assert here in the Court of Appeals or Appellate Division, or in front of Judge Cudah, that the statute requires judges never to use their discretion to grant youthful offender treatment, nor do I now. I only submit to the Court, as I have in the past, that the legislature was justified in granting that discretionary authority with the trial court. I have always been grateful that in this case we were not presented with the fact that the defendant was convicted after a trial, by verdict, of a misdemeanor or only because that is a much more difficult case.

I would say that I submit to this Court, the application of that statute in those circumstances, is also constitutional on the ground that that

defendant had available to him a jury trial, that the defendant is not reasonably left out of the class ground that is automatically entitled to youthful offender treatment, but I consider it a much harder case. I've never asked the Court in New York to pass on that case. I have always been at great pains that they never had to in this case. Here we deal with the context of the practice of plea bargaining.

In this connection, I'd only like to bring out to the Court, recall to the Court, the distinction that -- I believe it's Kenneth Davis in his administrative law treaties, between legislative facts and judicial facts, and it has never been my intention, nor was it in this Court in my papers, to suggest that there was some kind of protracted negotiation in this record. Indeed, there is nothing on the transcript indicating that. In passing on constitutional questions, this Court, any court, is obliged to consider legislative facts, basic data of society and of the processes at issue, whether it be income distribution, in passing on a tax statute or in this case; the procedures in court in this country and in the State of New York. I submit that I call to Court's attention legislative facts concerning the nature of plea bargaining and its pervasiveness in justifying the general distinctions

drawn or made in this statute. As you must undoubtedly be aware, when this Court rules on this case, it rules on this statute in applications manifold and involving many more than the simple thrust of the statute on Drayton today.

THE COURT: I understand that. As I tried to point out to Mr. Schwartz, I must look at the question in a somewhat different way than attempting to correct what I might think to be an unwise decision in the state courts or unwise acts of the legislature. Of course he understands that. The jurisdiction of the Federal Court is very limited.

MR. CARROLL: Next, Judge, if I may, conceding that, it must be noted that this action in this record does involve an offer by the defendant of a plea which was accepted by the people and which did make a bargain. It's never been suggested in this that it doesn't matter on this record that it was suggested that the defendant is now reneging on the plea and we can only assume that he thought it was a pretty good deal at the time. He did face seven years when he took the plea. He was guaranteed, when he took the plea, that he was obliged to do no more than one and possibly less.

THE COURT: Are you saying that it was an election made by him, which resulted in this alleged

inequality? Is that basically what you are saying?

MR. CARROLL: I'm not sure I understand your Honor's remark.

THE COURT: It is true that he did not have to make the plea. It is true he could have been convicted of a more serious offense, even despite what appears here. These are possibilities. Are you saying that because having waived the possibility, and elected to go forward on the misdemeanor basis of a plea, that he waived rights on sentence? With respect to sentence, is that really the point?

MR. CARROLL: No. My point, in bringing that to the Court's attention, is, first, that the facts of the bargain in this case relate to the probity of considering plea bargaining as generally one of rational bases for the statute. Secondly, the defendant must have thought it was a pretty good deal at the time, which seems to cut against the assertion, which I seem to detect in the brief, that indeed the indictment itself was always without foundation because had that been the case, the defendant lost nothing by going to trial, for if indeed there was nothing involved more serious than an A misdemeanor, he could have done no worse after trial by that plea and may have done considerably better. That's all.

The petitioner's counsel mentioned in his argument a case cited in brief, indicating that it's never appropriate to consider the fact or gravity of the accusation in the report for the Court that you consider that in fashioning sentence. I believe he is referring to Bryan. The citation to Thorsen and Craven in the memorandum I submitted are authorities for the contrary position, that the fact of the indictment is something which may permissibly be fashioned by any legislation to be considered. There is a remark in the memorandum to the effect that the statute is violative of the presumption of innocence. I thin kwe can all agree that the statute is a sentencing statute and by hypothesis, it applies only to those who are guilty.

It is a complex field and I think the case law on it, not only controlling this case, and I have indicated to the Court what I think controls, but I think, however legislatively persuasive Mr. Schwartz' argument was about certain harshnesses in the statute's application as applied to his client is not of constitutional dimension. It does have a rational basis which I submit exists and I have called them to the Court's attention, I believe in the memoranda.

THE COURT: All right, thank you very much.

Mr. Carroll.

MR. SCHWARTZ: May I just reply for just a minute and a half; no more than that?

THE COURT: All right. I'll hold you to that.

MR. SCHWARTZ: There was some statement made, I can't define it accurately, by Mr. Carroll indicating that we were reneging on a plea that we had made an election. May I repeat, your Honor, that number one --

THE COURT: I didn't understand that to be Mr. Carroll's points. I think he was disavowing it, not relying on it. Disavowing that as a position.

MR. SCHWARTZ: May I just add this brief point?

First of all, I reiterate my statement previously, that the record is devoid of any indication at all that there was plea bargaining. There may have been some plea bargaining. I wouldn't know.

THE COURT: I have your point on that.

MR. SCHWARTZ: Number two, I think -- permit me to advise the Court that it's my thinking and my feeling that the constitutional rights can never be waived and can be asserted at any time regardless of what had happened previously. The failure to raise constitutional rights in the Supreme Court and in the Appellate Division does not deny, does not prohibit it in the New York Court of Appeals of considering a constitutional

question. There can never be any waiver of constitutional rights.

THE COURT: Well, constitutional rights can be knowingly waived. We do it every day here in this Court where we ask the defendant to knowingly waive their right to a speedy trial. That's a constitutional right they have. I don't say that many of them are happy to exercise it and unhappy to waive it but they do.

MR. SCHWARTZ: It depends, your Honor, on what rights are waived.

(Continued on next page.)

THE COURT: What you can say, perhaps the truth is that constitutional rights can never be waived unknowingly; unknowingly. Do you understand what I am saying?

MR. SCHWARTZ: Yes, sir.

THE COURT: They can be.

MR. SCHWARTZ: Your Honor's statement is equally beneficial to my position.

THE COURT: Well, we will see. I'm going to have to reserve decision on this. I cannot decide right away.

MR. SCHWARTZ: May I make this request, your Honor? We'd like to get this defendant out on bail. We are ready to put up the bail to put him into a psoition to return to college and resume his education.

THE COURT: Well, I will try to decide the matter promptly. I assure you of that. I have taken a quick look and I feel it would be inappropriate for this Court to, before having decided this writ application, which is solely to test the constitutionality of his confinement, to anticipate a decision which I may not make. I may be of the opinion that there is not a constitutional violation here and in such circumstances, as I say, I just feel that I cannot

exercise that power. It's sparingly exercised. The cases say that. I think it would be improper for me to do that at this juncture. I will exercise my abilities to the best to decide this case and I am bound to a quick decision.

MR. SCHWARTZ: If your Honor please, the Appellate Division has permitted him to stay out --

THE COURT: But the state Court saved that jurisdiction. Youare asking me to assume the jurisdiction over him, which is incidental to a writ and all at this moment I am hearing your application that I should, in effect, spring him on the basis that his confinement was unconstitutional or he was denied equal protection of the law. That's what you are really asking to do.

I have not even decided whether I have the jurisdiction to do that, letting him out on bail is asking me for cake before I have even baked it.

MR. SCHWARTZ: Except, your Horor, if security is put up.

THE COURT: I know all the arguments. I don't doubt for a moment that he is a good risk, but you must remember that Federal/State court relations are very delicate and the Federal Courts are very careful

not to trespass on the jurisdiction of State Courts. You're here at the moment because of this extraordinary writ, writ of habeus corpus, a hearing of which was brought on to test the constitutionality of his confinement, under what you say is a statute which is unconstitutional, and you are asking me now to go beyond that and, in effect, exercise a jurisdiction which I do not feel the application for a writ gives me.

MR. SCHWARTZ: Frankly, your Honor, I never anticipated -- I didn't foresee this position, but I can see the juridical logic and bases for your Honor telling me that you don't know whether you have a jurisdiction, the power to release him. I can't argue with that.

THE COURT: He is in the custody of the State. I will be glad -- I will do my best to render a prompt decision.

MR. SCHWARTZ: May I thank your Honor for the privilege of listening to my dissertation and permit me to make this statement:

This is what I enjoy most in the practice of law.

THE COURT: I'm sure you do.

MR. SCHWARTZ: If your Honor please, the defendant Drayton, the petitioner here would like to

make a request of the bench and may I ask your Honor to indulge him in that respect?

THE COURT: What is that?

MR. SCHWARTZ: He would like to address your Honor.

THE COURT: Personally?

MR. SCHWARTZ: From the podium.

THE COURT: Yes, I will certainly permit him.

MR. DRAYTON: Firstly, I would like to ask a question. Do you have the power to release me, instead of my going back and forth being incarcerated?

THE COURT: Really, my power would only be this: that to find, if I should find that your conviction, shall we say, or your sentence was unconstitutional, and all I can do is send you back to the State Court for them to comply with the constitution.

Do you understand? That's the way it's done. We say that if we decide in favor of a prisoner or favorable to a right, all we do is say that we find that his imprisonment is unconstitutional and that unless he is released by the State Court, within such and such a time, then we will order his release. You see? That's the way it works. You are in the custody of the State, not in Federal custody. You are brought

here under a writ, released on our order just for the purpose of hearing your application. That does not give us general custody over you.

MR. DRAYTON: I understand.

MR. SCHWARTZ: If your Honor please, I overlooked something I should have called to the attention of the Court.

I have here two cases which I am told indicate or well stand for the proposition that the bench does have the power to release the petitioner.

THE COURT: Are those cases in your brief?

MR. SCHWARTZ: No, your Honor. Baker against Sard, 420 Fed 2nd 1342 -- at page 1343, and --

THE COURT: Did you give us this before? I haven't seen this.

Well, I have that citation.

Well, Mr. Schwartz, I see I was in error believing I was precluded from granting the release, but the conditions in this case that is cited here, I think would be overcome by my view that there would be no substantial harm to your defendant.

First of all, I indicated at the outset that regardless of what I do here, he will be released, as I understand it, shortly; is that it?

MR. SCHWARTZ: Yes, your Honor.

THE COURT: What really is at issue is the long-term effect. That is to say, if the Court would hold that denial of the right to be treated as a youthful offender was unconstitutional, the real effect is to order the State Court to grant him that status, non proton, to seal his record so he would not have a criminal record. Do you understand?

MR. SCHWARTZ: That's not the only issue.

This young man, his situation is complicated by the fact to lose another few days from his schooling, he's lost a week already. He's been in jail for a week. To have him lose any more schooling may possibly have two bad effects. Either he will lose too much time to overcome the instruction that he lost or possibly he may lose his momentum and lose impetus to go to school. We would like to put him back in the university on Monday.

THE COURT: I think I understand that, but certainly this is something that could have been brought on a lot sooner than bringing it out in the last minute.

MR. SCHWARTZ: Permit me to make this statement: I haven't handled this situation.

THE COURT: I am not blaming you.

MR. SCHWARTZ: I think we lawyers should sometimes be excused if we are not very prompt in these things. I have found myself in other cases when I plunge into other things, I knock out the research and knock out the briefs in a number of days. There are certain aspects and facets I did not think, that didn't come to my consciousness. If I hold onto something two or three weeks, ideas crop up in my mind. When I lose my sleep two or three o'clock in the morning, I think about these things and get ideas, so I don't think we lawyers should be pressured into rushing and plunging into a matter.

Please forgive us if we sometimes take a little bit longer. I am talking about my own personal experience.

THE COURT: As I say and tried to point out, I considered the important matter, whether or not a Federal Court improperly intrudes on the jurisdiction of the State. You understand in the State Courts and particularly this is so in the areas of criminal jurisdiction, I am perfectly willing to expedite a decision here. It's another thing, I feel, since I cannot at this point, in the light of the Court of

Appeals' decision, and what I have read, say that there is a substantial question here as is required by this or that he will suffer substantial harm if he remains for the brief period, even for the rest of his time.

As I understand it from you, I thought that the more important thing that was being striven toward is a clearance of his record, if he should have been entitled to that. Do you understand?

MR. SCHWARTZ: I understand.

THE COURT: I had no idea there was some pressure on to get him out over the weekend. I just don't wish to be put in a position when I haven't made up my mind yet. I have heard this argument, read these briefs. I have just got to think about this a little bit and do my best to expedite this.

MR. SCHWARTZ: Still, your Honor, I feel -- I understand your Honor's position. His Honor has to make up his mind whether you should intrude on matters decided by State Courts. Nevertheless, the whole shift of criminal jurisprudence, where prisoners are let out on bail, as long as the Court feels there is security adequate to guarantee the return -- we have a situation here, a boy who has suffered some emotional disturbances. He is an adopted child. I understand that at the time

he found out he was adopted, he simply went berserk and no longer acted in the way society required him to act. Thereafter, he was also raised in the ghetto, so he had improper associations.

Now, when you find somebody after all that, after spending six or seven months in jail, go back to jail and can achieve the marks that he did, I think we should even make some sacrifice to, well --

THE COURT: It isn't a matter of sacrifice, you understand. It would be a very simple thing to do something. I have an oath as a judge that I must respect. You wouldn't respect me if I acted out of motives of emotion and sympathy rather than respecting the law?

MR. SCHWARTZ: Please don't get angry.

THE COURT: By making these emotional arguments, you are not appealing to what I must as a judge obey.

MR. SCHWARTZ: I realize that.

THE COURT: My oath is to do justice according to the law, not according to the way I would have liked it. You think I am insensitive to this man's predicament or how his adopted parents feel about it. I'm not. I am sensitive. I sit here and I impose sentence when I see parents, wives and children in the court. I have

to do my duty, notwithstanding emotional feelings.

I am assuming if this man has made a good start he is smart enough to understand that the best way to keep going in the right direction is not in the wrong direction and I assume he will be patient enough to decide his, according to law, and not for purely sympathetic reasons because that's what matters. If people didn't get wrapped up in their emotions, sometimes they wouldn't break the law.

MR. SCHWARTZ: I think, your Honor, there is a statement that is commonly adopted in the philosophy of the law and must have been uttered by one of your great jurists. I don't know if Cardoza or somebody else said it. The bench always has a power, and perhaps I feel, the obligation to teach better justice with mercy, and I am --

THE COURT: I am not in the position at the moment of passing on this young man. That's what this applies to.

MR. SCHWARTZ: I think my request comes under that statement, too, but I am not going to belabor that point.

THE COURT: I am simply stating, I want time to reflect on it.

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MR. SCHWARTZ: Your Honor feels that you are limited and I'm not going to ask your Honor to break you -- violate your own conscience.

THE COURT: I am not going to reach out and create a situation which I know, over and over again, has been mentioned in the Supreme Court opinion, as to the limited nature of our jurisdiction and duty not to act capriciously or arbitrarily in these matters. We perceive, in due regard for the jurisidction of the State Courts and particularly in criminal matters, I can cite you any number of cases, but I wouldn't take the time now. It's getting late.

Those officers have been kept late; everybody. So, I think if you give me time to think about it, I will render as prompt a decision as possible.

MR. SCHWARTZ: May I make this request, your Honor?

I'm having a holiday weekend and during the holiday my mind will be wandering all over the lot. If I feel there is something additional I have overlooked, may I have a right to submit a short memorandum to your Honor?

THE COURT: I think you have submitted about all you can say.

MR. SCHWARTZ: You can never tell when a mind

stumbles onto something.

THE COURT: There comes a time when you better let it rest where it is, and I think you can count on a judge to also expend his mind a little bit, if given the opportunity to do it. The longer I sit here, the less opportunity I have.

MR. SCHWARTZ: Very well. Thank you, sir.

May he have a visit with his parents for a minute?

THE COURT: Yes, they may, if the marshalls will be forebearing.

(Thereby the above proceeding terminated at the time noted, 5:15 P.M.)

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ARTHUR DRAYTON,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK, EUGENE GOLD, District Attorney, and LOUIS J. LEFKOWITZ, Attorney General, State of New York, DEPARTMENT OF CORRECTIONS OF THE CITY OF NEW YORK and BENJAMIN MALCOLM, Commissioner, ARTHUR RUBIN, Warden of Rikers Island,

Respondents.

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MEMORANDUM AND ORDER

APPEARANCES:

SINGER & HSLOCK
Attorneys for Petitioner
By NATHAN SCHWARTZ, ESQ.

EUGENE GOLD, ESQ.
District Attorney, Kings County
Attorney for Respondents
By FRANKLIN L. CARROLL, III, ESQ.

NEAHER, District Judge.

Petitioner, in his application for a writ of habeas corpus,[1] challenges the constitutionality of section 720.20 (1) of the New York Criminal Procedure Law, which

mandates youthful offender treatment for eligible youths convicted of a misdemeanor in a local criminal court but leaves such treatment to the court's discretion when eligible youths are convicted of the same class of offense in a superior court. Youths in the former category automatically have their convictions vacated and replaced by a youthful offender finding, all records relating to their case remain confidential, and they are subject to a sentence of no more than six months in prison. Youths in the latter category, on the other hand, may be denied all of the benefits of youthful offender treatment, may receive sentences of up to a year and remain stigmatized with a criminal record.

CPL 720.20(1) makes the following distinction between youths convicted in "local criminal courts" (e.g., New York City Criminal Court) and those convicted in "superior courts" (e.g., New York Supreme Court):

> "1. Upon conviction of an eligible youth, the court must order a pre-sentence investigation of the defendant. After receipt of a written report of the investigation and at the time of pronouncing sentence the court must determine whether or not the eligible youth is a youthful offender. Such determination shall be in accordance with the following criteria:

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"(a) If in the opinion of the court the interest of justice would be served by relieving the eligible youth from the onus of a criminal record and by not imposing an indeterminate term of imprisonment of more than four years, the court may, in its discretion, find the eligible youth is a youthful offender; and

"(b) Where the conviction is had in a local criminal court and the eligible youth had not prior to commencement of trial or entry of a plea of guilty been convicted of a crime or found a youthful offender, the court must find he is a youthful offender."

I. FACTS

The effect of this distinction is well illustrated in this case. In 1972 a grand jury indicted petitioner, then 16 years old, on two counts of attempted robbery in the second degree and one count of assault in the second degree. All counts charged were Class D felonies. Petitioner entered a plea of not guilty. Several months later, in Supreme Court, petitioner was permitted to withdraw his not guilty plea and to plead guilty to the crime of assault in the third degree, a Class A misdemeanor, in full satisfaction of the indictment.[2] At that time the court also found petitioner to be an "eligible youth," i.e., he was eligible for youthful offender treatment because he was between the ages of 16-19 when he committed the crime, he

had not been convicted previously of a felony, and the indictment did not charge him with a Class A felony. CPL §720.10(1), (2).

At the subsequent sentencing, the court, on the basis of an unfavorable probation report, denied youthful offender treatment and sentenced petitioner to one year in prison. Had petitioner been in a New York City Criminal Court, he automatically would have been accorded youthful offender treatment, his sentence could not have exceeded six months and all official records relating to his case would be confidential.

Thereafter petitioner moved to set aside his sentence on the ground that CPL §720.20(1), the statute here under attack, violated the Equal Protection Clause of the Fourteenth Amendment. The sentencing judge denied petitioner's motion, and the Appellate Division, Second Department, permitted him to appeal both the denial of his motion and the conviction. The Appellate Division ruled against petitioner, 47 A.D.2d 952, 367 N.Y.S.2d 506 (2d Dept. 1975), and the Court of Appeals affirmed. 39 N.Y.2d 580, 350 N.E.2d 377, 385 N.Y.S.2d 1 (1976). On September 21, 1976, petitioner applied to this court for a writ of habeas corpus.[3]

II.

The issue raised by the petition is whether the Equal Protection Clause requires that no discrimination may be made in granting youthful offender treatment to eligible misdemeanants solely because conviction occurred in one court of the State rather than another. For the reasons which follow, the court holds that the Equal Protection Clause does impose such a requirement and thus the petition must be granted.

At the outset the court notes that there being no "suspect classifications" or "fundamental rights" involved in this case, it cannot subject the challenged statute to strict scrutiny. See Loving v. Virginia, 388 U.S. 1 (1967); Reynolds v. Simms, 377 U.S. 533 (1964). Instead, the "rational basis" test must be applied. McGinnis v. Royster, 410 U.S. 263 (1973). As the Supreme Court expressed this test in Walters v. City of St. Louis, 347 U.S. 231. 237 (1954):

> "Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is

> is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary."

The court recognizes that youthful offender treatment is not a constitutional right. Nevertheless, since the State legislature decided to require youthful offender treatment for convicted misdemeanants in local criminal courts, the State cannot fail to accord Drayton such automatic treatment unless there is a rational basis for such discrimination. See Rinaldi v. Yeager, 384 U.S. 305, 310 (1966).

With respect to this case, N.Y. CPL §720.20(1) has established two classes of eligible youths: those convicted of a misdemeanor in Supreme Court and those convicted of a misdemeanor in Criminal Court. Only after the conviction in either court does the statute come into play and sentencing take place. At this stage the only differences between Drayton's situation and that of a convicted misdemeanant in Criminal Court is that he was originally charged with felonies rather than misdemeanors and that he was prosecuted in Supreme Court rather than Criminal Court.

Following from these differences, three rational bases are suggested by respondents for the classification

established in N.Y. CPL §720.20(1): the greater seriousness of the offenses charged in Supreme Court; judicial economy, in that certain provisions concerning youthful offenders in Criminal Court promote efficiency; and the fact that Supreme Court defendants have the right to trial by jury whereas Criminal Court defendants do not.

A. Seriousness of Offense Charged in Indictment

The principal rational basis set forth on behalf of this classification is the greater seriousness of the offenses charged in the indictment of those prosecuted in Supreme Court as opposed to those prosecuted in Criminal Court. In affirming the Appellate Division's decision against Drayton, the Court of Appeals declared:

> "The distinction between youths charged in superior as opposed to local criminal courts is not arbitrary; it is based on the nature of the crimes over which such courts have trial jurisdiction." People v. Drayton, supra, 39 N.Y.2d at 385, 350 N.E.2d at 379, 385 N.Y.S.2d at 3.

Concededly the nature of the offense is a reasonable ground for determining the appropriate court in which the defendant should be tried. "Superior" courts commonly encompass more

serious matters within their jurisdiction than "lower" courts.[4]

Nevertheless, a classification which may be reasonable for one purpose may have no relevance in another context. The Supreme Court has emphasized that equal protection requires "that a distinction made have some relevance to the purpose for which the classification is made." Baxstrom v. Herold, 383 U.S. 107 (1966). While it is reasonable for one charged with a felony to be tried in a different court from one charged with a misdemeanor, those charges should have no impact whatsoever on the respective punishments meted out to convicted misdemeanants in the two courts. The range of potential punishment should depend not on the seriousness of the offense charged in the ex parte grand jury accusation but rather on the offense of which a defendant stands convicted.

Recently New York courts have considered an equal protection challenge to CPL §720.10(2)(a), which precluded the availability of youthful offender treatment to otherwise eligible youths who had been indicted for Class A felonies. In People v. Brian R., 78 Misc. 2d 616, 619-20, 356 N.Y.S.2d 1006, 1010 (Sup. Ct., N.Y. County, 1974), aff'd mem., 47 App. Div. 2d 599, N.Y.S.2d 998 (1st Dept. 1975), the court declared:

> "There is and can be no rational basis for treating differently youths who have been convicted of the same offense merely because one of them had originally been charged with a higher grade of offense. The restriction or classification based upon the charge proven in court is utterly capricious and irrational."

That statement is equally applicable to Drayton's situation.

United States v. Bland, 472 F.2d 1329 (D.C. Cir.), cert. denied, 412 U.S. 909 (1972), cited by the Court of Appeals in support of its ruling, is distinguishable from the present case. In Bland the District of Columbia Circuit Court of Appeals upheld the legislative exclusion of individuals charged with certain crimes from the jurisdiction of the juvenile courts. Such individuals were to be prosecuted in the regular adult court system. In Bland, however, the initial charge affected the proceedings in toto, whereas in the present case the New York statute only involves post-conviction disposition. The Bland court was primarily concerned with whether the Family Division or the adult court properly had jurisdiction over the case. Drayton accepts the jurisdiction of the Supreme Court. He contests, rather, the penalty which the Supreme Court judge can impose on him.[5]

B. Judicial Economy

Several "judicial economy" arguments are advanced on behalf of the statute in question.

Respondents point out that in 1971 the State legislature attempted to promote judicial efficiency by streamlining the procedures concerning youthful offender adjudications. See Denzer, Practice Commentary, N.Y. CPL art. 720, at 315-17. One of the major changes was to transfer the determination to grant or refuse youthful offender treatment from a point before entry of a plea to a point after conviction. N.Y. CPL §720.20(1). Whereas prior to the shift an investigation for the purpose of determining whether or not to grant youthful offender treatment was made of all eligible defendants, now an investigation need be made only of those who were convicted. Respondents claim that this more efficient allocation of probation department resources represents a rational basis for N.Y. CPL §720.20(1), the statute under which Drayton was sentenced.

The court recognizes that the shift of the determination to grant or refuse youthful offender treatment from

the pre-pleading to the post-conviction stage undoubtedly promotes administrative efficiency. It is irrelevant, however, with respect to Drayton's claim. Drayton is not challenging the point in time at which the determination of whether or not to grant youthful offender treatment is made, for this shift involved both the Supreme Court and the Criminal Court and it must be assumed that the former court as well as the latter benefitted thereby. But that benefit is not lost by the challenge made here. Drayton is attacking the more fundamental difference that in the Supreme Court youthful offender treatment is discretionary whereas in the Criminal Court it is mandatory for the same class of offense. This is an entirely different aspect of N.Y. CPL §720.20(1) from the one concerning the timing of youthful offender determination. Therefore, the administrative gains derived from the shift in timing cannot form a rational basis for the classification at issue here.

Respondents also contend that N.Y. CPL §720.20(1) promotes judicial efficiency by being an integral part of a scheme to eliminate jury trials in minor cases. By mandating youthful offender treatment in Criminal Court, N.Y. CPL §720.20(1), and by limiting the sentences for those found

to be youthful offenders to six months, N.Y. CPL §720.25,[6] the legislature was able to eliminate jury trials for eligible youths in Criminal Court, N.Y. CPL §340.40(7), without violating the rule that a defendant is entitled to a jury trial in any case where a sentence of more than six months is authorized. See Baldwin v. New York, 399 U.S. 66 (1970).

The elimination of jury trials for eligible youths in Criminal Court may be a rational basis for mandating youthful offender treatment in Criminal Court, but it does not explain why such treatment is not mandatory in Supreme Court.

Understandably, and in keeping with the decisions of the Supreme Court in Baldwin v. New York and Duncan v. Louisiana, supra, the legislature eliminated jury trials for eligible youths in Criminal Court while it retained them in Supreme Court because of the greater seriousness of the offenses charged in that court. Although this reason clearly is a proper basis on which to determine the right to a jury trial, as already demonstrated in Section A, supra, it is not a rational basis on which to decide that youthful offender treatment should be mandatory in Criminal Court but discretionary in Supreme Court.

It must be emphasized that the question here is, why should youthful offender treatment be discretionary in Supreme Court when it is mandatory in Criminal Court? The first two "judicial economy" arguments fail to address this question.

Finally, the New York Court of Appeals, in declaring N.Y. CPL §720.20(1) constitutional, stated that it was

> "proper for the Legislature to have decided that, in the interests of judicial economy, it was not necessary to require a time-consuming investigation for the purpose of determining youthful offender eligibility in misdemeanor cases where the criminal act charged is not as serious as in the case of felonies." People v. Drayton, supra, 39 N.Y.2d at 585-86, 350 N.E.2d at 380, 385 N.Y.S. 2d at 4.

It would appear from this statement that the legislature had eliminated "a time-consuming investigation for the purpose of determining youthful offender eligibility" in Criminal Court but had retained it in Supreme Court. A careful examination of the record and the relevant statutory provisions, however, indicates that no such action has been taken by the legislature. A finding of eligibility for youthful offender treatment still must be made in both Criminal Court and Supreme Court. A pre-sentence investigation of all convicted

defendants still must be made in both courts. There is no indication that the pre-sentence investigations of those convicted in Supreme Court are any more "time-consuming" than those concerning convicted defendants in Criminal Court simply as a result of the Supreme Court's having the additional burden of determining whether to grant or deny youthful offender treatment. Thus there is no indication of judicial economy arising from any differences in the investigations conducted in Criminal Court as opposed to those in Supreme Court.

C. Right to Trial by Jury

Respondents also argue that Drayton can be subject to a longer sentence in the Supreme Court because in that forum he has the right to a jury trial, whereas in the Criminal Court he would have faced a trial without a jury. Respondents analogize this situation to that involving the Youth Corrections Act, 18 U.S.C. §5010(b), which in some circumstances permits a youth to be incarcerated for a longer period than an adult who had committed the same crime. The confinement of the youth in special rehabilitative facilities constitutes a quid pro quo, which justifies the potentially

longer restriction on the youth's liberty. Carter v. United States, 306 F.2d 283 (D.C. Cir. 1962).

The analogy fails, however, because of the crucial barrier that makes pre-conviction and post-conviction proceedings separate and distinct. Since rehabilitative facilities directly affect people during their imprisonment, it is reasonable that people granted such benefits might be forced to remain in confinement longer. The right to a jury trial, on the other hand, has no discernible effect on the length of one's sentence, and it would be unreasonable to create any relationship between them.

D. The Guilty Plea

Drayton's guilty plea has created some confusion. The Court of Appeals decided that, in return for being permitted to plead down to a misdemeanor, Drayton had agreed he would not receive automatic youthful offender treatment and that he might receive a sentence of up to a year in prison. The Court of Appeals found this to be highly supportive of its ruling against Drayton.

The United States Supreme Court, however, in its

most recent case on the effect of guilty pleas, has clearly stated that one who pleads guilty does not "waive" his right to challenge all constitutional violations. Menna v. New York, ___ U.S. ___, 96 S. Ct. 241 (1975). See also United States ex rel. Daneff v. Henderson, 501 F.2d 1180 (2 Cir. 1974). As the Supreme Court explained in Menna:

> "[A] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established." Menna v. New York, supra, ___ U.S. at ___, 96 S. Ct. at 242 n. 2.

Drayton's claim is that the State may not deny him youthful offender treatment and sentence him to over six months in prison no matter how validly his factual guilt was established. Therefore, his guilty plea does not bar the claim.

In conclusion, it is important to recognize that the youthful offender statute is designed "to spare young adults who have violated the criminal laws from the stigma

and adverse consequences that necessarily flow from a criminal conviction." People ex rel. Colvin v. New York State Bd. of Parole, 75 Misc. 2d 432, 435, 347 N.Y.S.2d 831, 834, aff'd, 45 App. Div. 2d 50, 356 N.Y.S.2d 363 (3rd Dept. 1973). The classification examined above has permitted this stigma to remain with Drayton in violation of the Equal Protection Clause. He is in effect branded for life with an adult conviction, while other eligible youths convicted of the same class of offense in Criminal Court are spared such an adverse consequence.

To sum up, the three rational bases offered by respondent for the classification established by the State legislature in N.Y. CPL §720.20(1) — the seriousness of the offenses originally charged in Supreme Court, judicial economy, and the right to trial by jury — do not provide a rational basis for the discriminatory denial of youthful offender treatment to an equally eligible youth such as petitioner. To the extent that the statute permits such a result, it is violative of the Equal Protection Clause and unconstitutional.

Accordingly, Drayton's application for a writ of

habeas corpus is granted, his immediate release from State custody is directed, his conviction as an adult offender shall be vacated and replaced by a youthful offender finding, and the indictment and all other records pertaining to his conviction shall be sealed or otherwise retained in confidential status in accordance with youthful offender procedures.

SO ORDERED.

/s/ EDWARD R. NEAHER
U. S. D. J.

Dated: Brooklyn, New York
December 1, 1976

FOOTNOTES

1 Although not now confined, Drayton is still "in custody" since he was released on bail pending determination of this petition for a writ of habeas corpus. See Hensley v. Municipal Court, 411 U.S. 345 (1973).

2 The record does not contain any indication of plea bargaining. In fact, it reveals that the Assistant District Attorney, in recommending acceptance of the guilty plea, had concluded, after interviewing the complaining witnesses, "that the attempted robbery in the second degree was not a proper disposition based upon the statement of the witnesses themselves. This is an assault in the third degree at the most" (Plea Minutes at 4). While the charges in the indictment were not officially reduced, had the original charge been assault in the third degree (a misdemeanor), Drayton might well have been prosecuted in a local criminal court (CPL §10.30) and thus would have automatically received youthful offender treatment.

Although the Assistant District Attorney's statement illustrates the vagaries inherent in the prosecutor's discretionary power over the degree of the offense charged, see W. Mlyniec, Juvenile Delinquent or Adult Convict — The Prosecutor's Choice, 14 Am. Crim. L. Rev. 29 (1976), the court does not base its decision on this aspect of the case.

3 Since petitioner presented his equal protection claim to the highest State court in New York, he has exhausted his State remedies and properly can raise the same challenge to his conviction and sentence in this habeas corpus proceeding. 28 U.S.C. §2254(b); Picard v. Connor, 404 U.S. 270 (1971).

4 The degree of the offense charged in an indictment also may affect other matters, such as: the right to trial by jury, Duncan v. Louisiana, 391 U.S. 145, reh. denied, 392 U.S.

917 (1968); the right to receive a firearm shipped in interstate commerce, United States v. Craven, 478 F.2d 1329 (6 Cir. 1973), cert. denied, 414 U.S. 866, reh. denied, 414 U.S. 1086 (1973); the number of peremptory challenges, N.Y. CPL §270.25(2); and the length of time allowed the prosecution to move the case to trial, N.Y. CPL §30.30(3)(a).

5 There is no question here involving the extent of prosecutorial discretion, which traditionally has been broadly upheld. See, e.g., United States v. Verra, 203 F. Supp. 87, 91 (S.D.N.Y. 1962); United States v. Bland, supra. A court's discretionary power with respect to sentencing is also not at issue. Rather, the issue in this case concerns provisions enacted by the State legislature with respect to the different ranges of punishment allowable in the Supreme Court and the Criminal Court for the same class of offender.

6 In 1974 the legislature repealed N.Y. CPL §720.25 but retained this six-month limitation by placing it in the new N.Y. Penal Law §60.02.